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THE STATE OF WASHINGTON, ON THE
OF SEATTLE, [redacted]
TOGETHER WITH [redacted]
TAXPAYER OF SAID [redacted]
CHARGES, PLAINTIFFS IN ERROR,

vs.

[redacted]
BUILDING OF THE CITY OF SEATTLE,

IN ERROR TO THE [redacted]

[redacted]

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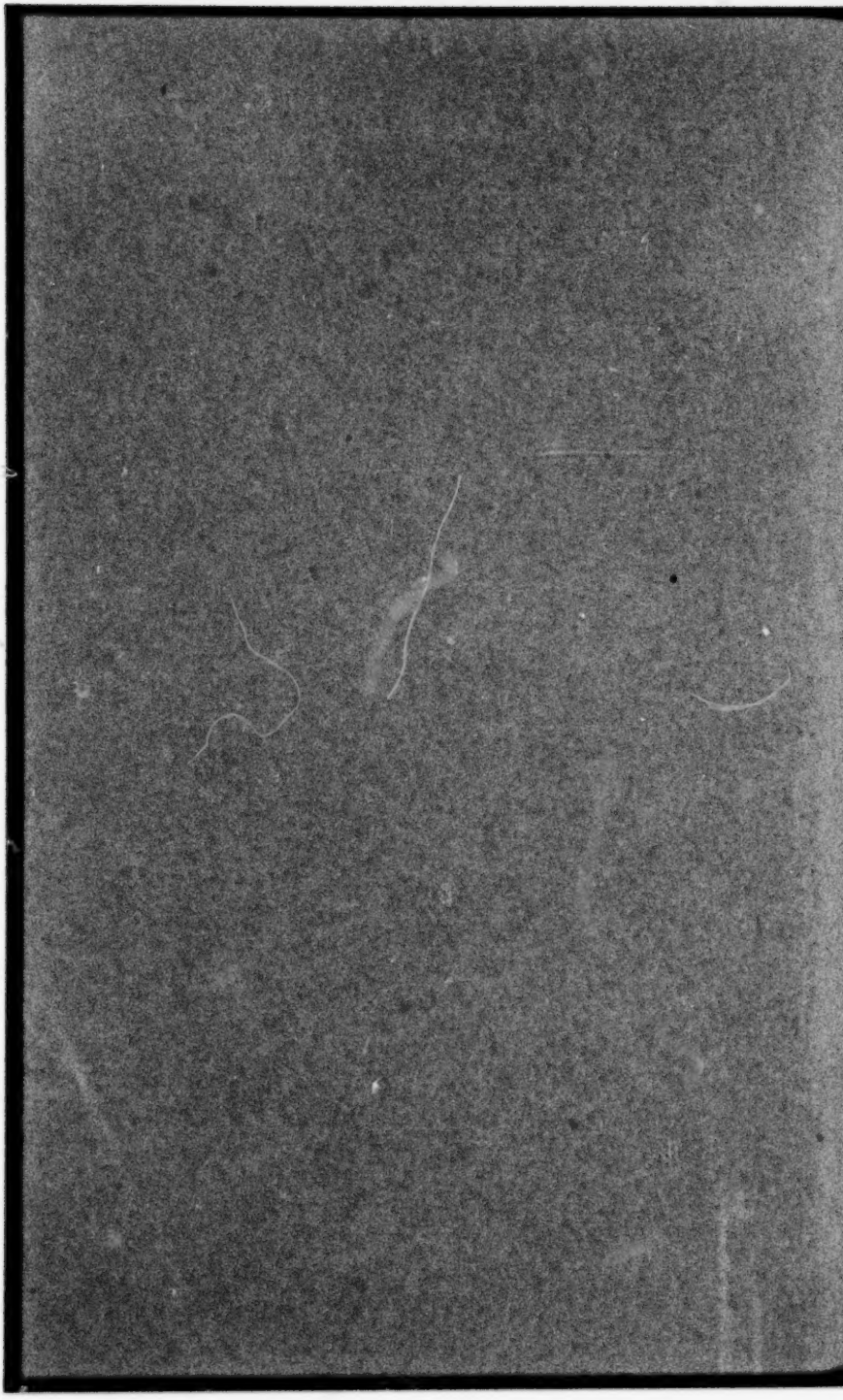

(33,095)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

No. 643 29

THE STATE OF WASHINGTON ON THE RELATION OF SEATTLE TITLE TRUST COMPANY, AS TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF CAROLINE KLINE GALLAND, DECEASED, PLAINTIFF IN ERROR,

vs.

GEORGE W. ROBERGE, AS SUPERINTENDENT OF BUILDING OF THE CITY OF SEATTLE

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 21, 1928

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IN SUPERIOR COURT OF KING COUNTY

No. 191,069

THE STATE OF WASHINGTON ON RELATION OF SEATTLE TITLE Trust Company, as Trustee under the Last Will and Testament of Caroline Kline Galland, Deceased, Plaintiff,

vs.

R. L. PROCTOR, AS SUPERINTENDENT OF BUILDINGS OF THE CITY OF SEATTLE, a Municipal Corporation, Defendant.

APPLICATION FOR WRIT OF MANDAMUS—Filed May 25, 1926

Comes now the relator, Seattle Title Trust Company, as trustee under the last will and Testament of Caroline Kline Galland, deceased, and petitions this court and makes application for a writ of mandamus to compel the said defendant to issue to it a permit to construct a building at 7500 Seward Park Avenue, in the city of Seattle, in accordance with application made for such permit by the said relator on May 11th, 1926.

This application is based upon the affidavit of Henry H. Judson, trust officer of said relator, hereto attached.

Shank, Belt & Fairbrook, Attorneys for Plaintiff.

STATE OF WASHINGTON, County of King, ss:

Henry H. Judson, being first duly sworn, on oath deposes and says:

I

[fol. 4] I am trust officer of Seattle Title Trust Company, and make this affidavit in support of the above application of said Seattle Title Trust Company for a writ of mandamus.

II

The said Seattle Title Trust Company is a corporation duly incorporated and existing as a trust company under and by virtue of the laws of the State of Washington relat-

ing to trust corporations, and has paid all license fees due to the State of Washington. The said defendant is now the qualified and acting Superintendent of Buildings of the City of Seattle, a municipal corporation, of King County, State of Washington, and it is his duty as such superintendent of buildings to issue permits to applicants therefor for the construction of all buildings to be lawfully erected in the city of Seattle, upon proper application being made therefor.

III

During the year 1907, Caroline Kline Galland died, testate, leaving a large and valuable estate situate in King County, Washington. By her Last Will and Testament, which was duly admitted to probate in the Superior Court of King County, Washington, the said Caroline Kline Galland gave and bequeathed to Seattle Trust and Title Company a large portion of her estate, in trust, for various uses and purposes, among which uses and purposes was the following, to-wit: That a certain portion of her estate should be sold and converted into cash and the money derived therefrom should be used in the purchase of a suitable site in or near the City of Seattle, Washington, and of sufficient size for the purpose hereinafter mentioned; that the said trustee should erect upon the said site a home [fol. 5] that should be known as the Caroline Kline Galland Home for aged and feeble poor, and that there should be admitted to it aged and feeble men and women, and that the said home should be so constructed and managed that it should bring to the lives of the aged men and women who should be domiciled therein the greatest degree of contentment and happiness in their declining years.

IV

That acting pursuant to the provisions of the Last Will and Testament of Caroline Kline Galland, deceased, as hereinabove set forth, the Seattle Trust Company, who was the successor of said Seattle Trust and Title Company, as such trustee, on July 13th, 1914, purchased the following described real property, situate in the City of Seattle, King County, Washington, to-wit:

Tract known as Wildwood in Plat of Wildwood, more particularly described as follows: Beginning at stone

monument at the northeast corner of Lot 4, Section 26, township 24 north, range 4 east, W. M., on the shore of Lake Washington; running west along north line of lot 4, 794 feet to a stone monument at the middle of the county road; thence southerly along the middle of said county road, 270.7 feet; thence east along the north line of lot 16, as shown on plat of Wildwood, 682 feet to a stone monument on shore of Lake Washington; thence northerly with meander to place of beginning; also Second Class shore lands lying in front of above tract; also the use of private right of way for footpath 18 feet wide along north side of lots 1 and 12 in Plat of Wildwood, excepting the portion thereof included within the County Road above mentioned; that the said property is a tract of about five acres situate about six miles in a southeasterly direction from the business portion of the city of Seattle; that the said property is bounded upon the east by Lake Washington, a beautiful, fresh water lake, which forms the easterly boundary of [fol. 6] the city of Seattle, and from the lake front the said property rises to the brow of a hill which is about four hundred feet from the lake shore, and then slopes downward in a westerly direction to Seward Park Avenue, which forms the westerly boundary of said tract; that the said property at the time of such purchase was and now is in a quiet and sequestered portion of the city of Seattle, well removed from businesses and manufacturing of all kinds; that the said property was at the time of such purchase and now is improved by beautiful trees and shrubbery and was and now is admirably adapted by location, situation and topography for a home for aged people, and it is the belief and opinion of this affiant that a place better adapted as a home for the aged people could not be found within, or in the vicinity of, the City of Seattle.

V

That forthwith after the purchase of the said property, the said Seattle Trust Company as such trustee established therein a home for aged persons and from that time up to the present the said Seattle Trust Company and this relator, who is the successor in interest and in the said trust of the Seattle Trust and Title Company and Seattle Trust Company, have continuously maintained such home.

VI

That applicants for admission to said home must be worthy or infirm men and women of good character, free from mental or contagious disease and neither blind nor physically helpless, and if at any time the mental condition of any of the guests becomes such that, in the opinion of a physician who has charge thereof, he or she is no longer a proper person to be retained in the home such person is [fol. 7] removed therefrom, and it is the intention of this trustee that only persons qualified as above set forth shall be admitted to said home or maintained therein.

VII

On June 18th, 1923, the city council of the city of Seattle passed an ordinance entitled "An Ordinance regulating and restraining the location of trades and industries; regulating and limiting the use of buildings and premises and the height and size of buildings; providing for yards, courts or other open spaces; and establishing districts for the said purposes," being ordinance No. 45382, which said ordinance was approved by the mayor of Seattle on June 28, 1923; that the said ordinance divided the city of Seattle into six use districts; that what was classified as the first residence district under said ordinance embraced the tract hereinabove described, owned by this relator, and embraced all other tracts situate in the city of Seattle which, by reason of price, situation and adaptability, could be used by this relator for its purpose as aforesaid; that section 3 of the said ordinance, as amended by ordinance No. 49179 subsequently passed and approved, provided as follows:

"Section 3. First Residence District:

(a) The following uses only are permitted in a First Residence District:

1. Single Family Dwellings.
2. Public Schools.
3. Private Schools in which prescribed courses of Study only are given and are graded in a manner similar to public schools or are of a higher degree.
4. Churches.
5. Parks and Playgrounds (including usual park buildings).

6. Art Gallery or Library Building.
7. Private conservatories for Plants and Flowers.
8. Railroad and Shelter Stations.

(b) In a first residence district, buildings and uses such as are ordinarily appurtenant to dwellings shall be permitted, subject to the limitations herein provided. A garage [fol. 8] in a first residence district shall not occupy more than seven per cent (7%) of the area of the lot, and the business of repairing motor vehicles shall not be conducted therein. In the case of a private stable, the written consent must be obtained of the owners of fifty (50) per cent of the property within a radius of two hundred (200) feet of the proposed building. The number of animals, not counting sucklings, in a private stable shall not exceed one for every two thousand (2,000) square feet contained in the area of the lot on which such building is located. Not more than one appurtenant building having a floor area of not to exceed thirty (30) square feet which is used for the housing of domestic animals or fowles shall be permitted on any lot in the First Residence District except that a building of greater area or a greater number of buildings shall be permitted when the written consent shall have been obtained of the owners of fifty (50) per cent of the dwellings within two hundred (200) feet of the proposed building; provided that such consent shall not be required if the number of said dwellings is less than four (4). The office of a physician, dentist, or other professional person when located in his or her dwelling, also home occupations engaged in by individuals within their dwellings shall be considered as accessory uses, provided that no window display is made or any sign shown other that one not exceeding two (2) square feet in area and bearing only the name and occupation of the occupant. The renting of rooms for lodging purposes only, for the accommodation of not to exceed six (6) persons, in a single family dwelling shall be considered an accessory use.

(c) A Fraternity House, sorority house or boarding house when occupied by students and supervised by the authorities of a public educational institution, a private school other than one specified in paragraph (a) of this section (3), a community club house, memorial building, nursery or greenhouse, or a building which is necessary

for the proper operation of a public utility may be permitted by the Board of Public Works after a public hearing. A philanthropic home for children or for old people shall be permitted in First Residence District when the written consent shall have been obtained of the owners of two-thirds of the property within four hundred (400) feet of the proposed building.

(d) Whenever the side line of a lot in the First Residence District constitutes the boundary of a business district or where said boundary line extends entirely across said lot from front to rear then an apartment house, boarding house or lodging house shall be permitted on said lot, provided that such use shall not extend more than sixty (60) feet from said district boundary line or one hundred (100) feet when such dimension shall carry said use to a street margin.

[fol. 9] (e) Nothing in this section shall be construed to prohibit the use of vacant property for gardening or fruit raising or its temporary use, conformable to law, for fairs, circuses or similar purposes."

VIII

Upon May 11th, 1926, this relator, for the purpose of better carrying out the said trust, made application to the defendant for a permit to erect a new building upon the said tract, to cost approximately $100,000.00; that this relator has not presented with said application the written consent of property owners required by section 3 (c) of the said ordinance hereinabove set forth, for the reason that the said relator was unable to obtain the same, and that the said defendant refused to issue the said permit for the sole and only reason that said building was to be used for an old people's home and said use was not permitted in a first residence district in accordance with the provisions of said section 3 of the said ordinance as amended, as hereinbefore set forth.

IX

That according to the best opinion and belief of this affiant the said ordinance is null and void in so far as it prohibits the granting of said permit, for the reason that there is no power or authority granted to the city of Seattle, or

the city council thereof, to enact such an ordinance and also for the further reason that the said ordinance is contrary to the provisions of sections 3, 7, 12, 16 and 23 of Article I of the Constitution of the State of Washington, and is also contrary to the provisions of the 5th and 14th amendments to the Constitution of the United States of America, and the provisions of the said ordinance hereinabove set forth constitute a taking of the property of this relator without due process of law, denies to this relator the equal [fol. 10] protection of the laws, and damages the said property of the relator for private and public use, without giving to the said relator due compensation therefor. The said ordinance further, in so far as it prohibits the granting of said permit to this relator, would deprive the occupants of said home of the right to reside in a large portion of the city of Seattle, for the reason that the said occupants are none of them members of families and would therefore be unable to reside upon the tract herein mentioned, or in any other portion of the city of Seattle which is suitable for their residence, and the said ordinance therefore denies to the prospective residents of said home the equal protection of the laws.

X

That this relator has no plain, speedy or adequate remedy at law in the premises.

Wherefore, this relator prays that an alternative writ of mandate be issued, directed to the said defendant, commanding him to issue the permit for the construction of said building as prayed for herein, or to show cause at some specific time and place why he has not done so, and that upon a final hearing hereof this court issue a peremptory writ requiring the said defendant to issue said permit as herein prayed.

Henry H. Judson.

Subscribed and sworn to before me this 22nd day of May, 1926. H. H. Frem, Notary Public in and for the State of Washington, residing at Seattle. (Notarial Seal.)

[File endorsement omitted.]

[fol. 11] In Superior Court of King County

[Title omitted]

Alternative Writ of Mandamus and Return—Filed May 25, 1926

The application of Seattle Title Trust Company for an alternative writ of mandate, which has been filed in the above entitled court and cause, being duly presented to this court and it appearing therefrom that the said relator is entitled to the relief demanded therein,

It is hereby ordered that the said defendant do forthwith issue to the said relator a permit to construct an old people's home at 7500 Seward Park Avenue, in the city of Seattle in accordance with application made for such permit by the said relator on May 11, 1926, or show cause why he should not do the same before this court in the court room of the presiding judge at the county court house in the city of Seattle, in said county and state, or before such other department of said court as the said matter may be referred to on the 7th day of June, 1926, at 9:30 o'clock in the forenoon, or as soon thereafter as said matter can be heard.

Done in open court this 25th day of May, 1926.

By the court:

Robert M. Jones, Judge.

[File endorsement omitted.]

[fol. 12] [Title omitted]

Return to Alternative Writ of Mandamus

Comes now R. L. Proctor, as Superintendent of Buildings of the City of Seattle, a municipal corporation, defendant above named, and for return to the Alternative Writ of Mandate issued from the above entitled court on the 25th day of May, 1926, files the attached Answer and Affidavit of E. L. Gaines.

Thomas J. L. Kennedy, Corporation Counsel, Walter B. Beals, Assistant, Ray Dumett, Assistant, Attorneys for Defendant.

[fol. 13] IN SUPERIOR COURT OF KING COUNTY

[Title omitted]

ANSWER TO APPLICATION FOR WRIT OF MANDAMUS

Comes now R. L. Proctor, Superintendent of Buildings of the City of Seattle, a municipal corporation, defendant above named, and for answer to the plaintiff's application for Writ of Mandamus herein admits, denies and alleges as follows:

I

Answering paragraph I of said application, admits the same.

II

Answering paragraph II of said application, admits the same.

III

Answering paragraph III of said application, this defendant states that he has no knowledge or information sufficient to form a belief as to the truth thereof, and therefore denies each and every allegation therein contained.

IV

Answering paragraph IV of said application, this defendant denies that the property described in said paragraph was at the time of its purported purchase and now is admirably adapted by location, situation and topography [fol. 14] for a home for aged people, and this defendant further denies that a place better adapted as a home for aged people could not be found within or in the vicinity of the City of Seattle; this defendant admits that the property described in Paragraph IV of said application is bounded upon the east by Lake Washington and that said property is well removed from business and manufacturing of all kinds; but to the remaining allegations of paragraph IV of said application, this defendant states that he has no knowledge or information sufficient to form a belief as to the truth thereof, and therefore denies the same.

V

Answering Paragraph V of said application, this defendant states that he has no knowledge or information sufficient to form a belief as to the truth thereof, and therefore denies each and every allegation therein contained.

VI

Answering Paragraph VI of said application, this defendant states that he has no knowledge or information sufficient to form a belief as to the truth thereof, and therefore denies each and every allegation therein contained.

VII

Answering Paragraph VII of said application, this defendant admits *that* the passage and approval of Ordinance No. 45382 (the Zoning Ordinance) and admits that said ordinance was amended by Ordinance No. 49179, but this defendant denies each and every other allegation in said paragraph contained.

VIII

Answering Paragraph VIII of said application, this defendant admits that the relator made application to this defendant for a permit to erect a new and additional build- [fol. 15] ing upon the premises described in Paragraph IV of said application. This defendant further admits that the relator did not present with said application, nor has not yet presented to this defendant, the written consent of the owners of two thirds (⅔) of the property within four hundred (400) feet of the proposed building as required by Section 3, Subdivision (c) of said Ordinance No. 45382, and this defendant further admits that he refused to issue said permit, upon the ground that the proposed use of said premises was in violation of said Ordinance No. 45382 as amended (the Zoning Ordinance).

IX

Answering Paragraphs IX and X of said application, this defendant denies each and every allegation therein contained.

Affirmative Defense

For further answer and by way of affirmative defense to the application of the plaintiff herein this defendant alleges as follows:

I

That at all times hereinafter mentioned Ordinance No. 45382, as amended, (The Zoning Ordinance) entitled: "An ordinance regulating and restricting the location of trades and industries; regulating and limiting the use of buildings and premises and the height and size of buildings; providing for yards, courts or other open spaces; and establishing districts for the said purposes," approved June 28, 1923, was and now is a valid and subsisting ordinance of the City of Seattle.

II

That the premises upon which the relator herein proposes to construct and maintain its new and additional home for aged persons is located within an area designated by said ordinance as a First Residence District. That at [fol. 16] all times mentioned in the application herein said District was, and now is, devoted entirely to single-family dwellings of a beautiful and artistic character, with the single exception of the existing old people's home conducted by the relator. That section 3, Subsection (e) of said Zoning Ordinance permits an old people's home within said district in the following case only:

"A philanthropic home for children or for old people shall be permitted in First Residence Districts when the written consent shall have been obtained of the owners of two-thirds of the property within four hundred (400) feet of the proposed building."

III

That on the 11th day of May, 1926, the "Caroline Kline Galland Home," by A. H. Albertson, its authorized agent, made application to the Department of Buildings of the City of Seattle for a permit to construct a new and additional old people's home on the premises described in Paragraph IV of the application for writ of Mandamus herein.

That the said application for a permit stated that the proposed home was to be thirty-nine (39) feet by one hundred eighty-two (182) feet and two and one-half stories in height. That the said application for a permit was by the Superintendent of Buildings of the City of Seattle refused, on the ground that the proposed use of said premises was in violation of the said Zoning Ordinance. That the said "Caroline Kline Galland Home" did not present with its said application for a permit, nor has it since presented to the Department of Buildings of the City, the written consent of the owners of two-thirds of the property within four hundred (400) feet of the proposed building. That the said "Caroline Kline Galland Home" has not obtained nor presented such written consent, for the reason that such property owners are opposed to the construction and [fol. 17] maintenance of the proposed old people's home, and have refused to give such written consent.

Wherefore, having fully answered the application for writ of mandamus herein, this defendant prays that the above entitled cause be dismissed and that he recover his costs and disbursements herein to be taxed.

Thomas J. L. Kennedy, Corporation Counsel, Walter B. Beals, Assistant, Ray Dumett, Assistant, Attorneys for Defendant.

Duly sworn to by R. L. Proctor. Jurat omitted in printing.

[fol. 18] In Superior Court of King County

[Title omitted]

Affidavit of E. L. Gaines—Filed June 17, 1926

State of Washington,
County of King, ss:

E. L. Gaines, being first duly sworn, upon his oath deposes and says: that he is the duly appointed, qualified and acting Executive Secretary of the City Planning Commission of the City of Seattle, and that during the preparation and adoption of Ordinance No. 45382, as amended (the Zon-

ing Ordinance), he was Engineer and Executive Secretary of the City Zoning Commission;

That there was enacted by the City Council of the City of Seattle in February, 1920, Ordinance No. 40407, relating to and establishing a City Zoning Commission and defining its powers and duties; the City Zoning Commission thus established consisted of the City Engineer, Superintendent of Buildings, a Park Trustee of the City of Seattle and six other members appointed by the Mayor. Said ordinance provided:

"That it shall be the duty of the City Zoning Commission to make a survey of the City of Seattle, with a view of dividing the same into zones or districts, and report to the City Council a zoning or districting ordinance, which shall specify the uses to which property in each district may be devoted, and from time to time to recommend to the City Council such measures as it may deem advisable for the promotion of the public health, convenience and welfare."

[fol. 19] Pursuant to the provisions of this ordinance an Engineer and Executive Secretary was chosen from the staff of the City Engineer, and under his direction an extended and detailed survey of the entire city was made, a great mass of information was collected, maps were prepared and the information tabulated for the use of the Zoning Commission. A map was prepared showing the existing uses of all property in the city, a large number of use classifications being shown thereon by symbols; another map similarly prepared showed the topography of the City, indicating also thoroughfares, highways, streets and street railway lines, present and proposed; another map showed density of population, and the trend and rate of growth, buildings and population of the various districts were also indicated. Another map showed within convenient limits the existing area or percentage of lot occupancy throughout the city; and still another map showed the assessed valuation of all property. Other studies were prepared to indicate factors which would influence the character and extent of development, residence, business or industrial of the various sections of the City. Copies of a large number of existing Zoning Ordinances of other

cities were procured and carefully studied, as well as all data bearing upon the legal aspect and trend of court decisions. Based upon this information, supplemented by careful field study, a tentative zoning plan and a preliminary draft of the Zoning Ordinance were prepared; district maps were published in the newspapers; and advertised public hearings were held by the Zoning Commission in every district of the City. At these public hearings the work of the Zoning Commission was explained in detail, lantern slides showing the proposed Zoning Plan of the neighborhood were thrown upon the screen and the entire subject discussed with the people of the vicinity.

As a result of these hearings the Plan was approved by the Zoning Commission, sometimes with detailed amend- [fol. 20] ments. Some two (2) years time was occupied in the preparation of this Plan and its presentation to the people, and although the Zoning Commissioners served wholly without pay, technical and engineering services involved an expenditure of some twenty thousand ($20,000.00) dollars.

Under date of January 12, 1923, after more than two (2) years of continuous labor involving more than one hundred meetings, the Zoning Commission filed with the City Council its completed plan and proposed zoning ordinance. This plan was considered by the City Council at several public meetings, slightly amended in a few details, passed by the City Council and duly signed by the Mayor, becoming effective July 27, 1923.

The premises upon which the plaintiff herein proposes to construct its new and additional home for aged persons are situated within an area designated in said Zoning Ordinance as a First Residence District. This district is logically and properly a R. B. M. residential district, for the reason that the existing buildings in the district are practically all first class residences, with ideal surroundings for home life.

E. L. Gaines.

Subscribed and sworn to before me this 14 day of June, 1926. R. B. McClinton, Notary Public in and for the State of Washington, residing at Seattle.

Copy hereof received June 7, 1926. Shank, Belt & Fairbrook.

[File endorsement omitted]

[fol. 21] In Superior Court of King County

[Title omitted]

Reply—Filed July 7, 1926

Comes now the plaintiff and replies to the affirmative defense of the defendant as follows:

1

It denies that portion of Paragraph II thereof which states that said district was and now is devoted entirely to single family dwellings of an artistic and beautiful character with the single exception of the existing old people's home conducted by the plaintiff.

Wherefore having fully replied to the answer and affirmative defense of the defendant plaintiff prays as in its application for writ of mandamus is more particularly set forth.

Shank, Belt & Fairbrook, Attorneys for Plaintiff.

Duly sworn to by Henry H. Judson. Jurat omitted in printing.

[fol. 22] Service of the within paper is hereby admitted this — day of ——, 19—. Copy of within received Jul. 7, 1926. Thomas J. L. Kennedy, Corporation counsel.

[File endorsement omitted.]

[fol. 23] In Superior Court of King County

[Title omitted]

Stipulation and Order of Substitution—Filed September 23, 1926

It is hereby stipulated between the parties hereto that George W. Roberge, as Superintendent of Buildings of

the City of Seattle, a municipal corporation, may be substituted as party defendant in the above entitled court and cause in place of R. L. Proctor, as superintendent, of buildings of the City of Seattle, municipal corporation.

Dated this 23d day of September, 1926.

Shank, Belt & Fairbrook, Attorneys for Plaintiff.
Thomas J. L. Kennedy, Corporation Counsel, Ray Dumett, Assistant, Attorneys for Defendant.

[File endorsement omitted.]

Order

Upon reading the foregoing stipulation and approval thereof it is hereby ordered that George W. Roberge, as superintendent of Buildings of the city of Seattle, a municipal corporation, be substituted as party defendant in place of R. L. Proctor, as superintendent of buildings of the City of Seattle, municipal corporation, and that the cause shall proceed further in the name of George W. Roberge, as superintendent of buildings of the city of Seattle, a municipal corporation.

[fol. 24] Done in open court this 23rd day of September, 1926.

By the Court:

James B. Kinne, Judge.

[fol. 25] In Superior Court of King County

[Title omitted]

Judgment—Filed September 25, 1926

This matter having come on regularly for hearing upon the merits, on the 27th day of July, 1926, the parties hereto being present and represented by their respective counsel of record, and witnesses having been sworn and examined, and other proofs adduced by both parties, said cause was submitted to the court; after argument of counsel, and the court being fully advised in the premises, finds the issues in favor of the defendant; now, therefore, it is hereby

Ordered, adjudged and decreed that the plaintiff's application for peremptory writ of mandate be, and the same is hereby denied. And it is further

Ordered, adjudged and decreed that this cause be, and the same is hereby, dismissed with prejudice and with costs to be taxed against the plaintiff herein, to which plaintiff excepts and to all thereof.

Done in open court this 25 day of September, 1926.

James B. Kinne, Judge.

Judgment Number 83964. Entered in Execution Docket, Vol. 80, Page 222. Approved as to form: Shank, Belt & Fairbrook, Attorneys for plaintiff.

[File endorsement omitted.]

[fol. 26] In Superior Court of King County

[Title omitted]

Notice of Appeal—Filed November 15, 1926

To the above named Defendant, and to Thomas J. L. Kennedy, Walter B. Beals and Ray Dunnett, his Attorneys, and O. B. Thorgrimson, Amicus Curiæ:

You and each of you are hereby notified that the above named plaintiff does hereby appeal to the Supreme Court of the State of Washington, from the final judgment or decree entered in the above entitled court and cause and from each and evry part thereof.

Shank, Belt & Fairbrook, Attorneys for said Relator.

Office and P. O. Address: 1002 Alaska Building, Seattle, Washington.

Copy of within received Nov. 15, 1926. Thomas J. L. Kennedy, Corporation Counsel.

Service of the within paper is hereby admitted this 15th day of November, 1926. O. B. Thorgrimson, by E. K., Amicus Curiæ.

[File endorsement omitted.]

ple de Hirsch of Seattle, Washington, and with the president and secretary of Temple de Hirsch, of Seattle, Washington, together with their successors in office, who shall be mentioned hereinafter as the Advisory Board, erect upon the said site a home that shall be known as the Caroline Kline Galland Home for Aged and Feeble Poor. The said Home shall be of the size and arrangement designated by said Advisory Board, provided always, however, that the same shall be of such size and arrangement as will permit the trustee to pay for the same out of the funds at its command. The said Home to be under the joint management and control [fol. 48] of my said trustee and the said Advisory Board. And there shall be admitted to it all aged and feeble Jewish men and women, as well also as aged and feeble men and women of or in accord with the belief recognized by the Society of Universal Religion, that may apply. It being my intention to have those occupy the Home who are in harmony upon religious creeds.

Thereupon the witness resumed.

Under this will the Seattle Title Trust Company received an estate valued at about a million dollars (St. p. 3) and of a present value of about a million and a quarter to a million and a half in round numbers. Under the provisions of this will, we purchased a site for the Home.

The witness thereupon identified three deeds under which title to the site for the Home was acquired and the said deeds were received in evidence marked Plaintiff's Exhibit 2. (St. p. 4.)

We paid for that property $27,500. The Dutton property, which is the chief property in the home site was acquired on July 13th, 1914. After the acquisition of the property with the buildings which were then on the site, the Home was established. There is about five acres of land in the home site located at 7500 Seward Park Avenue, some six to six and a half miles from the center of the city of Seattle. Most of the property in the neighborhood is in large tracts, that is three and four and five acre tracts. Since that time we have maintained that Home out there, and we are now maintaining about fourteen guests. (St. p. 5.) The property is a large tract, stretching from Seward Park Avenue down to Lake Washington. On the east side of the tract it slopes down towards the Lake some three hundred fifty or four hundred feet. The native trees were there. Those

have been cleared to a certain extent in the center of the tract so that a view of the Lake is obtained; but the native trees are there, both along the north and the south sides. The property is kept in very good shape. The income from this [fol. 49] estate at present is about one hundred thousand dollars a year, all of which is available for the maintenance of this Home. It has been costing us about twenty to twenty-two thousand dollars a year to maintain that Home. (St. p. 6.) We are proposing to spend on the new Home to be erected there about one hundred thousand dollars. The new Home is to be located towards the center of the property quite a long distance from the street, I should say 260 or 275 feet from Seward Park Avenue. This property is south of Seward Park. As you go down to Seward Park you turn up that little side street to go through to "Uplands", the new addition, and it is possibly three-quarters of a mile at a guess. It is just north of Kenyon Street.

The witness thereupon identified a photographic copy of the fire map of that particular locality, which was admitted in evidence as plaintiff's Exhibit 3. (St. pp. 7 & 8.) Petitioner's Exhibit 4 for identification is a photograph taken at the corner of Kenyon Street and Seward Park Avenue looking northward, the Home property being located on the easterly side of Seward Park Avenue. Petitioner's Exhibit 5 for identification was taken also from the corner of Kenyon Street and Seward Park Avenue looking north, only on the east side of the street. It shows the west side of Seward Park Avenue. Plaintiff's Exhibit 6 for identification was taken in front of the Home itself, looking east across the Home grounds across Lake (St. p. 9) Washington. The Home as it now exists stands just back of the point from which that picture was taken. Plaintiff's Exhibit 7 for identification is approximately the same view. It was taken a little farther south than the other one. Plaintiff's Exhibit 8 for identification is a view taken looking towards Seward Park Avenue from the north side of the Home grounds. There is a little private street that runs out from the northerly edge of the Home property. [fol. 50] Plaintiff's Exhibit 9 for identification was taken inside the grounds.

Plaintiff's Exhibit 10 for identification is a view inside the grounds looking towards Seward Park Avenue.

Plaintiff's Exhibit 11 for identification is the main house as it now exists.

Plaintiff's Exhibit 12 for identification is also a view inside the grounds, showing the house. Seward Park Avenue (St. p. 10) is to the rear. This picture is looking towards Lake Washington down over the hill.

Plaintiff's Exhibit 13 for identification is inside the grounds looking towards Seward Park Avenue along the north line of the property; that is, 12 looks in towards the house and 13 looks from the house out towards the street. They show the same roadway only different views of it taken just opposite ways.

Plaintiff's Exhibit 14 for identification is taken from across Seward Park Avenue looking directly at the Home property. You cannot see the Home building in this photograph, but it stands behind that tower.

Plaintiff's Exhibit 15 for identification is on Seward Park Avenue. The greenhouse that is shown to the north has no connection with the Home. (St. p. 11.)

Plaintiff's Exhibit 16 for identification is taken from a place north of the Home property looking south down Seward Park Avenue. The marks "X" and "Y" on this picture mark approximately the northern and southerly boundaries of the property.

Plaintiff's Exhibit 17 for identification was taken on the northern boundary of the property looking generally down Seward Park Avenue and showing the property across the street. That is, those cottages that are shown here on [fol. 51] Plaintiff's Exhibit 17 are homes directly across Seward Park Avenue in front of the Galland Home.

Thereupon all the photographs which had been identified by the witness were received in evidence and marked Plaintiff's Exhibits 4 to 17 inclusive (St. p. 12).

Upon cross-examination the witness further testified as follows:

I was not the Trust Officer of this company when it purchased this property. I have held that position only since the death of Shoemaker, which occurred last March. During the year 1923 I was Assistant Trust Officer, and Mr. Shoemaker was Trust Officer (St. p. 13). I probably heard during the winter of 1923 about a Zoning Ordinance or a

proposition to zone the city of Seattle (St. p. 14). I know that at the time the Zoning Ordinance was thought of being put into effect there was naturally newspaper publicity with reference to it. I have no knowledge of any steps taken by my company to ascertain how this property was being zoned by the Zoning Commission. If any protest had been made by my company it would probably have been made by Mr. Shoemaker or myself. I personally made no protest or investigation. I do not know whether or not Mr. Shoemaker made any investigation or protest. We keep a file of records in connection with the Galland Trust (St. p. 15). I do not know how many tracts there are in that neighborhood which contain four or five acres. The property south of the Home, I should say for four or five tracts are large tracts there. I don't know the exact number (St. p. 16). I don't know whether any of the three or four or five acre tracts are to the north of this property (St. p. 17). Mrs. Galland's will provided for this Home about which I have testified. The will further provides that if funds accumulate in sufficient amount, they shall [fol. 52] provide another Home and then if funds accumulate sufficiently in amount they shall provide an orphanage. The Home which is now in existence is the first home mentioned in the will—home for aged and feeble poor (St. p. 18). Nothing is said in the will about limiting any of these homes as to its size or capacity. We might desire to build another building as large as the one we now contemplate on this five-acre tract (St. p. 19). We do not own any other tract near this five-acre tract under this Trust. We own, as trustee, another tract of land down there as trustee under the will of Bonham Galland, Caroline Kline Galland's husband. To the best of my knowledge, nothing has been done by our company to improve this other tract of land (St. p. 20). It has not been definitely decided what we will do with the building now used as an old peoples' home, if we should be allowed to construct a new building. I imagine it will be torn down. I have not heard any suggestion made that it will be moved down on to this other tract which we own under the Bonham Galland will. I have made a search through the files of the Mrs. Galland estate and find no record that we made any objection to the zoning of this property (St. p. 23).

ISAAC COOPER, called and sworn as a witness on behalf of the plaintiff, testified as follows:

I reside in the city of Seattle and am now and have been for many years a member of Temple de Hirsch. I was one of the executors of the Caroline Kline Galland will. Since Mrs. Galland's decease in 1907 I was on the board of directors of that congregation for a number of years, and afterwards I served as president, and during my term I visited the home quite frequently. I help to institute a system there of auditing the accounts, and I went out a number of times and counseled with the superintendent,—visited [fol. 53] the old people there, and took an interest such as I would take in an institution of that kind. Some years after Mrs. Galland passed away, Mr. Galland (St. p. 24) came to me and said that he thought we should look up a site for the Home. We visited different sections of the city and we finally decided, everything considered, that this site at the Lake, which is now in question, was the most ideal site of any that was offered. As to the particular elements that we were seeking to find for the establishment of a Home of that sort, the first one was transportation. There was a car line within a few blocks of the home. The next one was a place that was quiet. The next one was a place that was not fully or thickly settled, like other sections. The next was the Lake,—the view from the lake, and the fact that these old people would have a chance to roam around the grounds, and, if they desired, to go down along the Lake and spend their time there. We found nothing in our searches that we considered as desirable as this particular piece of property. The grounds, the shrubbery, the trees and the fruit and everything in there was so attractive to us that we thought, in addition to the other points, that that was one very much in its favor. After we acquired this home we immediately began to use it as such (St. p. 25). After Mr. Dutton vacated it, which was about six or eight months after we acquired it, we have used it as a home ever since. I have been president of Temple de Hirsch, and as such was on the board of control of the Home. The people that we admitted into the Home before they could enter the Home had to pass a medical examination that they were sound. The next one was to take only such a class of people that we thought would be congenial

to those that were already there, and mostly to take care of people who were unfortunate,—who had become reduced in circumstances,—and make it a haven for them. We [fol. 54] never looked upon it as a charity institution. We looked upon it as a home. We looked upon those people as guests of ours, in taking care of them; not charity, but simply to take care of them and give them a home and give them all the comforts of home. We only took elderly people (St. p. 26), and that has been our system ever since. They had to pass an examination that they were sound in every particular. The building that is now being used for the Home was used as a residence by Mr. Dutton, and when we took it over in order to accommodate the inmates, they of course had to make quite a few changes.

Upon cross-examination he further testified as follows:

That whole locality is a very nice locality. (St. p. 27.) There are other tracts in that locality that I think are just as beautiful as this tract. All the land there is very beautiful (St. p. 27) and desirable for residence purposes. I think the ge limit for admission to that Home was somewhere between fifty and sixty, but I am not absolutely sure about that. When I say that the persons fortunate enough to be admitted were examined by a physician and pronounced sound, I mean of course that they were free from infectious diseases or mental diseases, and that they were in good health considering the age of the person. Naturally in a place of that kind, we were very particular so that we didn't get anybody in there that was going to be a burden and cast a gloom around the place on account of sickness; so that we took every means so that these people were sound mentally as well as any other way. (St. p. 28) After admission to the Home, I presume, from an humanitarian standpoint, if the inmate happens to be taken sick, they can't very well throw them out on the street. They certainly have to take care of them and do the best they can. And, [fol. 55] I believe there have been several cases where people were taken to the hospital and operated on, and when thy were found able to get back they went back. We have no hospital on the grounds. These people were taken to a hospital in the city. (St. p. 29)

HENRY H. JUDSON, recalled as a witness on behalf of the plaintiff and testified as follows:

The original cost of this property was $27,500.00 and we have added about $25,000.00 more. We have a sprinkler system in the front part of the property that runs under the ground.

Upon cross-examination the witness on behalf of the plaintiff testified as follows:

I cannot give you all the various items. It includes naturally, house painting and renovating and repapering, and putting in cement sidewalks, cinders on the drive, putting in the lawn,—there was another entire lawn put in under the orchard trees,—the underground (St. p. 30) sprinkler system. The lawn and underground sprinkler system was put in in 1925. I do not know whether it was before or after the company made its application to the Zoning Commission for reclassification of this property.

FREDERICK V. FISHER was called as a witness on behalf of the plaintiff and testified as follows:

I reside in the city of Seattle and am a member and the president of the congregation of the Temple de Hirsch, (St. p. 31) and am president of the Advisory Board. I have been on the Advisory Board of that Home for seven years, and am familiar with its operation.

[fol. 56] The witness thereupon identified a copy of the Rules and Regulations of the Home, which document was received in evidence and marked Plaintiff's Exhibit 18. These Rules provide that applicants for admission to the said Home must be worthy or infirm men and women of good character, free from mental or contagious disease and neither blind nor physically helpless, and if at any time the mental condition of any of the guests becomes such that in the opinion of the physician who has charge thereof, he or she is no longer a proper person to be retained in the home, such person is to be removed therefrom.

Thereupon the witness resumed.

As president of the advisory board it is my duty to appoint a committee on applications which consists of three

members. This committee functions,—it carefully goes into the moral character of every applicant, and the applicant is also subjected to a medical examination by a competent physician. We do not admit anyone who is affected mentally. (St. p. 32.) Nor anyone who has a contagious disease of any description. It has always been the idea of the men connected with it to create a home atmosphere in this home. It is not what you would call an institution or hospital, but primarily we aim to create a home atmosphere, and we have been successful in that. We have improved the grounds quite extensively. We have a beautiful lawn there,—a lawn which has been beautified from time to time, with fruit trees planted in front,—that is, facing Seward Park Avenue; and, to the best of my recollection, the shrubbery facing the Lake,—the rear end of the property has been left almost in its natural state as much as possible. For the operation of this property, we have in the first place, a superintendent and his wife. We have a cook and dietician, a maid, one gardener in the winter time and two gardeners in the summer. (St. p. 33) I believe there are fourteen in that Home at the present time; we have never had over fifteen. We are now planning to en- [fol. 57] large our home there. We wish that the new building will be located approximately 250 feet from Seward Park Avenue; not far from where the present building is located, and the will of Mrs. Caroline Kline Galland provides such a building. We feel that we are financially amply able to take care of it. It is not, in a sense, a charitable organization. We do not go to the Community Chest or other organizations of its kind asking for help for maintaining this home; but it is maintained entirely out of the income derived from the Caroline Kline Galland estate. Our present plans simply contemplate the building of this additional new Home building, which will be a large home-like fireproof building to cost about $100,000.00. (St. p. 34) The neighborhood surrounding this Home is mostly in larger tracts, not sixty or eighty foot lots. This feature makes it particularly desirable for a home. The property to the south of this property is platted in larger tracts, but the property to the north is not in so large tracts as those to the south. The Ruth Home for Girls is located about half a mile north of our building in Judge Everett Smith's old

residence. This is maintained as a charitable organization in the Community Fund, and I believe the Juvenile Court has jurisdiction of it. (St. p. 35)

Thereupon a map of the city of Seattle was received in evidence and marked Plaintiff's Exhibit 19.

The red mark upon plaintiff's Exhibit 19 states approximately the location of the Galland Home. The Crittenden Home is south of the Galland Home (St. p. 36) about a mile.

Upon cross-examination witness testified as follows:

I do not think this property has declined in value since we purchased it. (St. p. 37) I am not engaged in the real estate business and am not acquainted with real estate [fol. 58] values out in that section. The only people who are admitted to that Home are old people whose moral standing is satisfactory and people who are not afflicted with mental or contagious disease. The age of the applicant guest of the Home is, according to the book of Rules, fifty five years, but in some cases we make an exception and take them under that age. (St. p. 38) We have never admitted any person afflicted with either a mental or a physical disease. As to whether a person is entitled to admission under the will, that would be up to the examining physician and the Committee on Application. (St. p. 39.) If any person who is admitted has any property, that is generally turned over to the Seattle Title Trust Company, as executors under the will, to go into the trust fund for the benefit of this property. The cost for each one of the guests is approximately $2,000.00 per year. (St. p. 40.)

Upon redirect examination the witness testified as follows:

If a guest of the Home needs medical attention and the physician finds that he or she is better off at a down town hospital, we send them there. (St. p. 41.) We have no hospital connected with the institution at all. We are trying to create a home atmosphere in this place. I don't know of any other place in the city of Seattle that is as desirable for that home as out there. (St. p. 42.)

Upon recross-examination the witness testified as follows:

If a person became mentally weak we would have to take them out of that Home and put them somewhere else.

[fol. 59] A. H. Albertson, witness for the plaintiff, being duly sworn, testified as follows:

I reside in the city of Seattle and have been retained as architect for the proposed Home to be built upon the home site of the Caroline Kline Galland Trust. I am familiar with the general topography of the land around and about this property. (St. p. 43.) The property is what we refer to as an eastern aspect, of which about onehalf of the property, practically, drops towards Lake Washington. The western half, approximately, is level from the proposed building site to Seward Park Avenue. The natural vegetation has been retained on both property lines, the north property line and the south property line, facing eastward towards the lake. The property is well adapted for a fine type of building. The property in that particular neighborhood averages in larger tracts than elsewhere in the city in the first district. The property lying south of this property, and for a quarter of a mile or so, is unplatted and is retained in acre tracts from five acres, the Kline Galland tract, down. I do not think there are any tracts south of that less than an acre or two. The property lying north of it is larger than ordinary city lots by considerable. Not as large as it is to the south, although there is (St. p. 44) one tract that contains something in acreage. My office, under my supervision, has made a general blueprint of this property and the location of the proposed new building. This blueprint marked Petitioner's Exhibit 20 for identification is it. This particular tract of land is approximately five acres and averages seven hundred thirty-eight feet long and two hundred sixty-six feet wide. The north and south axis of the proposed building is about two hundred eighty feet from the property line in front. It will be about thirty five to the ridge of the roof, which is approximately the same height [fol. 60] as the existing building. The building will be one hundred eighty-three feet long, designed after the

English type of country residence, the endeavor being to keep it in the form of a residence. For that reason, the English type was used, which calls for a building sitting closely to the ground, and it produces a domestic type of building rather than a monumental type. (St. p. 45.) It is a fireproof Class A building. It is the English type of residence taken after the cottage form and kept so as to look like a house or residence or home, or country estate, as nearly as might be. That was the conception we gave to the construction. It has sewer connection and water, and all modern conveniences. I have made a general survey of the property with a view to determining how much of the building would be exposed to the public gaze as you pass up or down Seward Avenue way. I walked along the sidewalk in front, looking in towards the proposed building, and found that the north two-thirds of the proposed building could not be seen from the sidewalk excepting the vista which would be gotten (St. p. 46) from the north driveway which would show one glimpse of the north end of the building. The south one-third is visible from four spots on the sidewalk,—glimpses. Three of them are between apple trees. The opening varies from five to eight feet in which you get a passing glimpse; and the fourth one is up on the south drive, and gives a vista of the south end. Then, I walked up the north axis of the proposed building,—north and south axis and looked outward to see what buildings I might see across the street, and I was able to see a portion of the second story and roof of three buildings, two of which are directly across, and the third which is slightly south of directly across. I should say that there is one—the one that sits on the corner on the north next to the street—is visible down the lane in the same fashion that the [fol. 61] building itself is visible from the street. I figured that about four per cent of the area of the property would be occupied by this building. Under the Zoning Ordinance we would be permitted to occupy up to thirty five per cent. (St. p. 47.) With reference to the number of residences that could be put upon that site under the Zoning Ordinance, I figured out the tract, including appropriate streets and facilities on the basis of lots forty by one hundred ten, approximately, and it permits of forty-one lots of that size. The average family, I understand, is about (St. p. 49) four

and a half or four and three-quarters persons. This home has twenty-four guests' rooms, a few of which are double rooms, and could accommodate thirty guests. Thirty is the limit. Petitioner's Exhibit 21 is the west elevation and 22 is the east elevation. These cuts fairly and faithfully represent the type of building that we are proposing to erect upon that property. The purpose of the similarity between the two elevations is to make both sides equally attractive. (St. p. 50.) The fact that the building is located a few feet forward of the present building permits of grounds towards the Lake which the inmates may use. Considerably less than half of the building will be visible from Seward Park Way. The upper two thirds will not be visible from the sidewalk. The elevation of this house is no greater than the house that is there at the present time. (The blueprint and photographs which had been theretofore identified by the witness were thereupon admitted in evidence and marked Plaintiff's Exhibits 20, 21 and 22.) The little dots marked on Petitioner's Exhibit 20 in the front part of the property represent an old apple orchard in front of the proposed (St. p. 51) site of the building. The trunks of the apple trees vary in diameter from eight to eighteen inches. The dots on the rear por-
[fol. 62] tion also represent the exact location of trees. The house is located to save the greatest number of trees. The circle around the property on the blueprint (Plaintiff's Exhibit 23 for identification) represents the area covered by swinging a radius of four hundred feet from the nearest point of the proposed building entirely around it. (St. p. 52.) The distance to the nearest building on the south from the proposed building scales one hundred sixty feet. The nearest building in front of the property is three hundred twenty-five feet to the west. The nearest residence to the north is about one hundred ten feet. (St. p. 53.) Said blue print was thereupon admitted in evidence and marked Plaintiff's Exhibit 23.

Upon cross-examination the witness testified as follows:

This particular tract is very well adapted for a beautiful building such as the plans for which I have prepared. All the property around there is very desirable property (St. p. 54.) I would not say that the adjoining property is

quite as good as this property. It is a matter or æsthetics and a matter of taste. It is very desirable, but I do not like it as well as this particular tract. The lawn of this particular tract slopes about a twenty-five per cent grade on the eastern portion of the tract. The view of the house from the street is obscured by trees. I have no opinion where the next unit for the Home would be located on that tract of land. When I prepared my plans and located them on the ground I considered the possibility of an enlargement, as I always do in any investigation I make on the property. I did not allow for expansion. I merely personally made an investigation of that from my own point of view. (St. p. 55.) I did not locate this building so as to allow for expansion. I located this building for the best needs of this particular building. There is room for plenty more structures. I have not any tentative plan of {fol. 63} this property showing forty-one lots into which the property might be divided. I took my draftsman in the office and checked the width of the lot, which is 266 feet and subtracted two lots of one hundred ten, or minus two hundred twenty. Two hundred twenty from two hundred sixty-six leaves forty-six feet for street and sidewalk. We did this merely by rule of thumb without taking into consideration of the topography of the tract. I did not raise the question in my mind as to whether the property on the slope towards the Lake is adapted to that kind of platting. I think it is adapted for good residences. (St. p. 56.)

Redirect examination:

There is an area in the front of the building which is more than two hundred feet distant from adjoining dwellings. I should judge that area would be equivalent to about sixty by one hundred sixty feet. I think it is irregular in shape. (St. p. 58.)

Mrs. Felicia Pater, witness on behalf of the plaintiff, being duly sworn, testified as follows:

I am now and for seven years have been matron of the Caroline Kline Galland Home, and am familiar with the

improvements in the neighborhood. There is a greenhouse about 350 feet north of this property. The character of this greenhouse is all right. About a year and a half ago it was enlarged and improved. The Ruth School for Girls is located about half a mile to the north of the Galland Home. (St. p. 59.) There has been a store put in that greenhouse and it is maintained there now. I understand that they sell flowers—their own products.

Thereupon the Zoning Ordinance of the City was received in evidence and marked Plaintiff's Exhibit 24.

[fol. 64] Thereupon the Amendments to the Zoning Ordinance were received and marked Plaintiff's Exhibit 25.

DEFENSE TESTIMONY

CHARLES H. ALDEN, a witness on behalf of the defense, being duly sworn, testified as follows:

I am now and for twenty-five years have been an architect. I graduated from the Massachusetts Institute of Technology. Prior to being in practice for myself, before coming West—I was in charge of the Harvard Medical School in Boston—the making of the plans and the construction of the buildings. I represented the supervising architects of the A. Y. P. Exposition in Seattle. I represented them in Seattle, and managed their Seattle offices and was in charge of that work. Also the work for the University of Washington,—we were the architects (St. p. 63) for the three buildings. I had charge of the Specifications Department and the Architectural Department for a time of the Panama Pacific Exposition of San Francisco. I have been a resident of Seattle seventeen years. I was appointed a member of the Zoning Commission when the Zoning Commission was formed in 1920 or 1921. I was elected secretary of the Commission at their first meeting, and I served continuously on the Commission until it was superseded by the City Planning Commission. I am a member of that body. I am the secretary of the City Planning Commission, also chairman of the Zoning Committee of the Commission. When this body proceeded to zone the City of Seattle, the members first made a study of the prin-

ciples of zoning (St. p. 64) from any literature they could find available, and made a study of the zoning ordinances of other cities. As soon as funds were available, we employed an engineer and an executive secretary. The next [fol. 65] step in zoning was to make a survey of the city to ascertain the existing uses of property. We then made—our engineer, under our direction—made certain study maps showing the assessed valuation of property in the city, the distribution of population, the traffic in different sections of the city, and other data of that kind that we considered would be useful in the zoning of the city. We then made a careful survey of the city and began making tentative maps as to what we considered should be the uses of the different pieces of property. Also of the areas which would be covered, and the heights of the buildings. We, at the same time,—about the same time we began to study what the text of the ordinance should be, and how the different uses should be classified and described in the ordinance, how the different area districts should be provided for, the width of side and rear yards and so on, and the heights of the buildings. When we had completed our tentative ordinance and our tentative maps, we had—we endeavored to get those before the people as much as possible. We had a meeting with the representatives of the different newspapers in the city to see what could be done to get as much publicity as possible, and these tentative maps were published. We would have a tentative map of a certain district published as to how we suggested the zoning should be done. And then, we would have a meeting (St. p. 65) in that vicinity at a certain time, and we wanted all the property owners and anyone interested to be at that meeting and give us their help in arriving at a final recommendation. We began holding those meetings in the different sections of the city, and the property owners in that section were notified of the time and place of that meeting. We then held those meetings. Our executive secretary and engineer was present and explained by lan- [fol. 66] tern slides how we proposed to zone that section, and explained the purpose of the zoning; and the members of the commission were always there also and explained the purposes of the zoning and what it was for—its effect and so on, and asked for any suggestions that we could get from any persons present at the hearing. We tried to

get as full an expression of opinion as possible from those interested, and on the basis of information which they gave us, we revised our tentative maps as we thought best, and sometimes we visited the property and made a study that we thought was sufficient to arrive at the best recommendation we could make. We continued that until the whole city was covered. And finally, after we had carefully considered all the phases of the zoning ordinance, we submitted our recommendations to the City Council. The City Council made slight amendments after we submitted it to them, and then enacted it into the Zoning Ordinance (St. p. 66). The City Council had the Zoning Ordinance under consideration for five or six months. We had several meetings with the City Council and committees of the City Council during that time to take up different matters. They considered the matter carefully during that period. There were nine members of the Zoning Commission. We had a great many neighborhood meetings, which were held by the Zoning Commission during the period when the ordinance was being prepared. The Ordinance as reported by the Zoning Commission represented the best judgment of the Zoning Commission. It was not substantially changed by the City Council, only a few minor changes. We were working on the Zoning Ordinance for two years. We zoned the entire area within the limits of the city of Seattle (St. p. 67). Where the conditions were such that we could not determine uses, such as second residence and business, [fol. 67] we zoned those undeveloped areas first residence, as we felt unable to locate business units which would afterwards occur. The idea of the Zoning Commission in doing this was if we zoned first residence, which is most restrictive, and as the property developed, it appeared desirable as business units or second residence units, allowing apartment houses,—the ordinance could easily be amended to provide for it. And, in an undeveloped tract, it is practically impossible to determine the best locations for those specific uses. Those large areas were zoned as first residence districts without any idea that they would always remain in that classification. It is an elastic ordinance, and we so explained in all the hearings. There must be modifications as the city develops and changes. A large portion of these amendments which counsel for the petitioner has introduced are changes in classification of prop-

erty. (St. p. 68.) The planning commission has recommended to the city council and the city council has adopted changes which seem desirable from time to time, and it is expected in the future there will be many more such changes as the city grows and develops. It is a fact that on application large areas of what is now zoned first residence may be changed to second residence or business. Upon proper applications being made, they necessarily will be so changed. The theory underlying the property zoned as first residence is that first residence property permits single family use, as opposed to multiple family use. It also permits buildings which were considered by the Zoning Commission and are considered by the zoning authorities in other cities as appropriate to a single family classification, such as churches and some other uses which appear in the ordinance. A very considerable number of cities in the United States have zoning ordinances and we [fol. 68] made a careful study of all the available ones. (St. p. 69) The Seattle Zoning Ordinance follows the mass of those in general principles. A great many of the ordinances do not have as many subdivisions as the Seattle Ordinance. It is quite common in zoning ordinances to have fewer classifications. For instance, to have a residence classification and a business classification. That is done in some of the zoning ordinances, and some of them have more classifications. In zoning property first residence district we tried to look forward into the future as far as possible. I am familiar with the five-acre tract owned by the Galland Estate and the adjoining property, and in my opinion a natural and proper classification of that property including that surrounding it is first residence. That is very desirable high class residence (St. p. 70) property and very suitable to fine single family residences. It is developed to a very considerable extent, and we took into consideration both the improvements that were on the property when we zoned it as well as the future possibilities. There is no reasonable probability in my opinion, of that property becoming anything but first residence property at any time in the future.

Upon cross-examination the witness for the defendant testified as follows:

In zoning the property the maintenance of real estate values in the community was a consideration. As other considerations we had in mind the general welfare of the city as a whole, the health and safety of the population. We did (St. p. 71) not consider zoning a financial question. An old folks' home is an institution. An institution has an effect on single family residence property which we considered called for its classification otherwise, and that is the reason why we classified it otherwise. We did not consider that an institution belonged in a first class resi- [fol. 69] dence classification. That corresponded to what we found was done in zoning ordinances in other cities. An Old Folks' Home would have a detrimental effect on the property and on the people living there.

Thereupon the following occurred:

Q. And that is the reason you classified it otherwise than first residence? (St. p. 72.)

A. On account of the——

Q. —the depreciation of the value of the property surrounding it?

A. Not altogether.

Q. Not altogether? Well, what else?

A. As I tried to say before. We did not consider zoning a question of money value.

Q. I am asking you just with reference to the old folks' home,—and I am asking you, Mr. Alden, to state what other elements caused you to classify an old folks' home in some other district than a first residence district, other than the depreciation of the value of the real estate surrounding it?

A. It has a detrimental effect on the property.

Q. All right; you have said that once before.

A. I won't say whether that is measured in dollars or not. It has a detrimental effect on the property.

Q. Well, you have said that once.

Q. It makes the property less desirable to live in.

Q. Why?

A. Because, people in maintaining a home,—families in maintaining a home, do not desire to have an institution of that kind adjacent or near them.

Q. That is the——

[fol. 70] A. Their home is injured to a certain extent.

Q. Now, in which way is it injured?

A. Beg pardon?

Q. In what way is it injured other than the æsthetic reasons they may have for not wanting to live near six or eight or ten old people?

A. It is not an æthetic question at all.

Q. Well, I am asking you, Mr. Alden, to give us the reasons? What are those reasons? You can't say just because the next door neighbor doesn't want that home there, that that is any reason for not zoning it properly can you?

A. No.

Q. Well, now, what are the reasons that you can give as to why — zoned the old folks' home out of the first residence district?

A. Because the presence of that old folks' home in that district gives to the other property in that district a—it creates a certain condition——

Q. What condition?

A. What condition?

Q. You say, a certain condition.

A. It makes it less desirable to live in.

Q. In what way less desirable?

A. The people are not satisfied.

Q. That is all?

A. They do not care to live there in the same way they do not care to live in an apartment house section, or a section with stores in it.

Q. Is there any other reason, Mr. Alden, that you think of, as to why it should be classified in that way?

A. Well, I think that is a pretty,—the fact that that [fol. 71] building is near them, or in their locality, gives a character to that locality which it otherwise would not have.

Q. Well, what character? What character does it give?

A. Strictly, it is not so suitable for first residence use as it would be otherwise.

Q. Well, I want to be fair with you; but I am trying to get your reasons for it. In what way is it not so desirable, other than the depreciation of the value of the property which you have testified to?

A. It prevents it being considered a single family residence district, or a home district.

Q. Then explain to the Court why you put a public school in a first resident district. In other words, you could establish a public school in this district, or on this Galland property, couldn't you?

A. We could.

Q. Yes.

A. We could not, but the Board of Education could.

Q. In what way do you consider that a desirable thing to be next to,—a public school?

A. No.

Q. You don't so consider it, do you?

A. Well, I wouldn't care particularly to be next to a public school.

Q. Well, that also has an effect upon the desirability of residence property around it, doesn't it?

A. To some extent.

Q. Well, now, Mr. Alden, I want you,—and you have qualified here in a very full and ample way,—I want you to state to the Court, because I assume that you, if anybody, [fol. 72] could give the reasons why you so classified it, other than those you have here specified. Are there (St. p. 75) any other reasons?

A. You refer to the old folks' home?

Q. Yes, sir. You ought to be able to think of the reasons if there were any without taking such a long time. At the same time, I do not want to hurry you any.

A. The question of the effect that an institution of that kind has in a locality, or simply the fact that an apartment house is in a locality, it has an effect upon that locality which is detrimental to single family home use.

Q. Yes. Because it depreciates the value of the property?

A. Yes. That is one reason. Not——

Q. Well, what are the other reasons?

A. It makes the property less desirable to live in,—the locality,—to be occupied for that purpose.

Q. Why is it less desirable?

A. Why?

Q. Yes. Why is it less desirable?

A. Because people, when they maintain a home, they like to be in a vicinity of homes,—single family homes. The old folks' home is not a home of that kind. It is an institution. The occupants are not bound by family ties. And,

they wander around in the vicinity, and they give a certain character to the whole locality. It is not a family,—it is an institution, and the people are not related. They are maintained there.

Q. Any other reason?

A. Oh, I think I have covered the reasons for zoning.

Q. You want that to stand as covering the reasons that controlled you in classifying this as you did? (St. p. 76.) [fol. 73] A. That covers it as near as I can say now,—our reasons for zoning an institution out of a first residence district.

We do not claim that the Zoning Ordinance is infallible. We had expert advice on the subject and made a careful study of it and used our best judgment, but we do not think the results are perfect. There are some orphanages in the city of Seattle. I don't remember the specific names. St. P. 77.) There is an orphanage known as the House of the Good Shepherd. I do not recall where it is. I have a general idea of the locality of the Kenney Home for Aged People. I could not find the exact site on the map. (St. p. 78.) The property marked with an "X" on Plate 1 Exhibit 24 is classified as second residence district property, while all about it is first residence district property. (St. p. 79.) A block of land marked "X" on Plate No. 2 of Exhibit 24 is classified as second residence property, while all about it is first residence property. I do not know that that is a Catholic school and church. (St. p. 80.) Originally this ordinance prohibited absolutely an old folks' home in this locality. Subsequently the Zoning Commission recommended that an old folks' home might be maintained in a first residence district when the written consent of two-thirds of the property owners within a radius of 400 ft. had been obtained. (St. p. 81.) The explanation of this which I would make was that we considered that if the property owners within that radius considered that the Home which it is proposed to be placed in the locality would not be objectionable to them, that it would not be objectionable to the rest of the city, and therefore it should be allowed.

Redirect examination:

In zoning a residential district some area is allowed for business and some for second residence. We expect in [fol. 74] every residence section there will be a community business center. That was found to be desirable, and we considered that we should provide for such use, and we did recommend such use in residence areas when we could ascertain where those would be. So in almost every residence district, you find a business area completely surrounded by residences. That is one of the elements of zoning. Also second residence area would ultimately occur in residence (St. p. 82) sections,—in our undeveloped residence sections, in some cases, we did not zone any second residence, because we could not determine where that was to be. That was because it was undeveloped. In almost every district where it was developed there would be found some business and some second residence and surrounding both of them some first residence. (St. p. 83.)

E. L. Gaines, a witness appearing on behalf of the defense, being duly sworn, testified as follows:

I am the executive secretary of the City Zoning Commission and have held that position since the creation of the Planning Commission about the first of last year. Prior to that I was engineer and executive secretary of the City Zoning Commission. (St. p. 86.) I have held that position since February 1922. Prior to that date I was connected with zoning work in the capacity of assistant to the engineer who was then in charge. I have been in close connection with the Zoning of the city of Seattle ever since the work was started. In connection with the preparation of the zoning ordinance by the Zoning Commission for its submission to the city council, a very comprehensive survey was made of the entire city. The existing conditions and uses, customs of the people and the topography, rate of growth,—when I say existing conditions, that means in great detail. [fol. 75] A map was prepared showing the existing uses of all the property in the city,—classified in considerable detail. A large number of classifications, in order that they

might easily be segregated into the various districts. The customs of the people and the value of real estate, the height of buildings, the area of buildings, their relation to the,—the relation between the various areas of the city, particularly as regards topography, etc.,—a very large number of factors were taken into consideration in this preliminary survey, to say nothing of a careful study of the ordinances, court decisions, etc., of other cities and states. (St. p. 87.) Then we decided first upon the number of classifications,—the designation, the general type of each district; then began to divide the city into these various districts, and to frame regulations for each particular district. After a long, careful study, and adjustment of those boundaries,—an adjustment of the line of demarcation as to final various uses, etc., the ordinance was made up. Notices were printed from time to time in the public press of the city of Seattle advising the people as to what was going on. We were limited somewhat in the amount of money which could be expended for that purpose, but we took advantage of every opportunity to get the work of the Zoning Commission and the scope of it and intent of it and the spirit of it before the people of this city; in newspaper items,—even in notices which were sent out with the water bills in the mail, to every property owner of the city, as nearly as might be. I have here a large number of clippings from newspapers indicating the publicity which was given to the zoning work. And I have here reproductions of some of these clippings which I carry with me. (St. p. 88.) Reproductions of the newspaper clippings published during the time the Zoning Ordinance was in the course of [fol. 76] preparation and presentation to the people; after the preliminary draft had been completed and the preliminary districts outlined. Some slight adjustments were made after those classifications were made, during the progress of the public hearings.

Thereupon these reproductions of newspaper clippings were received in evidence and marked Defendant's Exhibit A.

I have also with me a chart showing the property uses as they were then in effect in the city, as made up by the Zoning Commission. This is a map showing the existing use of property divided into fifteen different classifications.

This is a sample map, a similar record being made of all the property in the city of Seattle at that time,—at the time that survey was made. This was made up as a preliminary part of the survey made by the Zoning Commission. This is just a sample section of the entire map and another map showing the existing height of buildings in the down town section. (St. p. 89.)

Thereupon the map was received in evidence and marked Defendant's Exhibit B.

A similar chart was made of the height of buildings where buildings are generally greater in height than residences—in those districts. All the property within the corporate limits of the city was zoned. As a rule, the outlying property which was undeveloped and which had not been built up was classified as first residence property, even though it was undeveloped property. If the line of development was clearly shown or indicated by existing highways and development had gone exceptionally far, other classifications were introduced, such as local business districts, etc., for the convenience of the people who were to live there. If there was no such indication, the property was zoned simply first residence district, with the expectation that as development proceeded, certain other classi- [fol. 77] fications might be introduced into that area. Every residence district as it develops and grows (St. p. 90), requires other classifications if it is of any considerable area. I have made a study of zoning during the past five years. I have read all available literature that I could reach or have time to read on the subject of zoning. I have attempted to study all the court decisions,—as they should come to my notice, at any rate,—and I have examined the ordinances of a very large number of other cities. The zoning commission, at the time the plan was made, went out over the city and observed the topography and the improvements in the city, and have done so since as requests have been made for changes. I believe I am thoroughly familiar with the city of Seattle. I was connected with the office of the City Engineer of the city for about fifteen years prior to that time. (St. p. 91.) In regard to a place in the corporate limits of the city of Seattle which would be fitted for an old folks' home, in my study of this particular case,—at the time the request was made for its admission at that

place, and since,—I made some study of the city, and tried to determine where such an institution might properly be located. Having in view the desirable features mentioned a while ago in testimony of one of the witnesses, namely, transportation, quiet, seclusion, some view, pleasant surroundings,—I find that there are a considerable number of locations in the city where such conditions obtain. There are areas now zoned as second district, for example, in the East Madison district,—in the general vicinity of East Madison Street, from 15th Avenue north to Lake Washington Boulevard. A large area,—at various places sparsely built, having those qualifications. Likewise at Alki Point there is a large area similarly available and adaptable. At Pigeon Point, likewise. The area south of Young- [fol. 78] town,—there is a large area there, while it is not now zoned as second residence district, yet it is (St. p. 92) held in large tracts, and it seems evident to me that it would be a simple matter for the site to be acquired, the present owner of the site giving sufficient consent to meet the conditions of the ordinance. The same thing is true with reference to Avalon Way in West Seattle, east of Admiral Way. Beacon Hill, particularly south of the Golf Links,—for a considerable area, clear south to the city limits. Many tracts have such qualifications. In the district adjoining First Avenue South, near the south city limits. The area above Fauntleroy, and a very large area near the southeast city limits, to say nothing,—these sites appear to me to be particularly available for such use. Probably there are many others in the city. I have been personally assured by the owners of very large acreages in the city that they, themselves, would sell at a very reasonable price, tracts, and give consent such as would come within the purview of this present ordinance.

A. B. Matheson, a witness on behalf of the defendant, being duly sworn, testified as follows:

I reside at 7332 Seward Park Avenue, and am the owner of the greenhouse there. That greenhouse has been there since 1906, and I have been raising flowers there and selling them at retail all that time, with the exception of two years when I leased the greenhouse, in 1914 and 1915, (St. p. 94)

but even then it was operated as a greenhouse exactly the same. There has been no change made in the method of selling flowers there. As to the changes about a year and a half ago, I remodeled the front end of the greenhouse,—cut it off. It was getting pretty well racked and I cut it off about twenty-five—that is, really, I put in a wall,—it was [fol. 79] done in the months of January, and the contract was to put in an outside wall, and I think the wall is six inches thick,—it was put on the outside of the old wall, and built over the old building. From what the neighbors all say, the change made it better. (St. p. 85.)

Upon cross-examination the witness testified as follows:

The contract price of these improvements was twenty-five hundred dollars. (St. p. 95.) The old building was torn back down to a certain point and then it was rebuilt over the old building. I conduct a flower store in the corner of my greenhouse. I do buy a little, of course,—basket and wire work—and panel work and ribbons we buy. (St. p. 96.) It is a place where automobiles come along and people get flowers. I expect to add to my sales by reason of the fact that I am there on the highway. I also buy some flowers and retail them out as all florists do. (St. p. 97.) Before remodeling I had no store front or anything of that sort in the greenhouse. I had there a storeroom where I did my retail business, and all my funeral work. When I did that remodeling a year ago last January, I then for the first time built a storeroom in the front of the building.

Upon redirect examination the witness testified as follows:

The space where the storeroom is was previous to that time used as a greenhouse and storeroom. (St. p. 98.)

Recross-examination:

The old wall was torn out so that there was a new concrete wall, an entirely new superstructure and a new store. (St. p. 99.)

[fol. 80] Thereupon the defendant introduced a copy of the Zoning Ordinance as it is now amended and the same was received in evidence and marked Defendant's Exhibit C.

E. L. Gaines, recalled for further examination, being duly sworn testified as follows:

While the Zoning Ordinance was in process of compilation by the Zoning Commission, as I recall, there were about forty district meetings held in which there was discussed the work of the commission and the proposed plan with the people of the various vicinities. (St. p. 101.) Notice was given of those meetings in the public press of the city. The proposed text of the ordinance in many cases was presented through the press, and the districts,—particularly the districts were published in Sunday newspapers at all times, and sometimes daily before that. The Zoning Commission had the benefit of expert advice in preparing or submitting this plan for the zoning of the city. Harlem Bartholomew, an internationally known expert, was employed by the city to assist in this work. He came to Seattle from his home in St. Louis, Missouri. Later on, after the draft of the ordinance was practically completed, he was also employed to revise the work. The theory of zoning the city is based on an attempt to provide by these various districts and localities for a proper,—to provide in a proper manner for all of the uses of the people who live in the city,—provide for that and segregate the uses in a way that will best promote the good of each. The three different phases of our ordinance were use districts, height districts and area districts. They were separately considered, though quite frequently coterminous. That is to say, the first residence (St. p. 102) district was generally coterminous with an [fol. 81] area district A,—or the most restrictive area district. Likewise the business district was *likewise* generally coterminous with area district C, provided for that district, etc. By use district, we mean a district in which a certain specified list of uses were permitted, or from which certain specified lists of uses were prohibited. By area districts we mean districts in which a certain percentage of a lot might be covered by buildings. Certain open spaces provided, set-back lines, yards, courts, etc. By height district, we mean the height to which it is lawful to build in a particular district. Plate 1 of defendant's Exhibit C shows the use districts allowed out in the northern part of the city, just north of the University, which was referred

to yesterday by plaintiff's counsel. (St. p. 103.) The physical facts surrounding that district are not the same as the physical facts surrounding the district which is the plaintiff's property. Difference in topography, existing use, density of population, location, are some of the various factors upon which zoning segregation is based. The two districts differ materially. The plaintiff's property is situated more than a mile, I believe, from a second residence district, and a quarter of a mile or more from a business district. I have not the exact figures as to that. Undeveloped tracts of land are generally known as first residence, even though they are sparsely populated, and even though at some later time it will be necessary to provide second residence districts or business districts for the convenience of the uses which may be (St. p. 104) required there. Those undeveloped tracts are zoned as first residence districts before people are living there to any extent. For one thing, it is much easier to make a change of classification into a less restrictive district than it is to place restrictions later on property which theretofore had been zoned in a less [fol. 82] restrictive manner. The city has grown very materially since the Zoning Ordinance was framed by the Zoning Commission, and is still growing and developing rapidly. Changes have been made from time to time as these out lying districts develop and build up. That was always contemplated, and they may be made right along as necessity arises. That was the expectation of the Zoning Commission. No matter how desirable property may be, it is recognized that every residence district must have a business district available. The ideal of proper zoning,—the idea of zoning for a first residence district, probably, would provide for nothing but dwellings. However, it is necessary, in accordance with our customs of living,—individual factors governing zoning,—that certain accessory uses (St. p. 105) are incidental to a dwelling or living place, and must always be provided, regardless of the fact that some of those things are not for the,—in other words, that they detract somewhat from the value of the property immediately adjoining them. I refer to such uses as schools, churches, parks, playgrounds with their buildings, art gallery or library buildings, conservatories for plants and flowers,

railroad or shelter stations; also the incidental or accessory uses, such as garages and private stables. A stable is an accessory or appurtenant building to a residence building. The Ruth Home is at number 34 North 68th Street, approximately ten or twelve miles from the property owned by the plaintiff. There is an institution about half a mile from plaintiff's property (St. p. 106) which is a school for girls owned and conducted by the public school system. I am familiar with the district in which plaintiff's property [fol. 83] is situated. It is high grade residential district whose character has become fixed. It is one of the good residential districts, and potentially one of the finest residence districts.

Upon cross-examination the witness testified as follows:

I was engineer and executive secretary of the zoning commission practically from its inception to its dissolution, and I was thoroughly familiar with the work of the commission. I was not technically a member of the commission, but it was my duty to be aware of the work of the commission, of course. We gave notice in the public press of the meetings, together with publication of the proposed plan for that particular district or neighborhood, and invited all residents and property owners to be present at those hearings, and at those hearings the purpose and plan of zoning was presented to the public. Pictures,—that is, lantern slides of the proposed plan were thrown on a screen, and the entire matter discussed with the residents of the community. (St. p. 108.) I have forgotten now whether there was more than one public hearing held in the vicinity of this Home. There was at least one held in the school house in that district at any rate. (St. p. 109.) Referring to Plate 15 of Plaintiff's Exhibit 24, which contains the Galland property, one of the public hearings was held in the school house which is off that plate to the north, and another was held in the school house which is a little way off this map to the south. (St. p. 109.) From the north to the south lines of Plate 15, I presume is some few miles, probably two miles. (St. p. 110.) I do not know that the Galland Home or Seattle Title Trust Company ever received any notice of any meeting. We sent out small booklets or folders with the water bills, advising peo-

ple to investigate. In classifying, our records undoubtedly [fol. 84] showed an institution at the point where the Galland Home is located. (St. p. 111.) As to whether it had been operating there for some years, I don't know whether I made special investigation of that point, but that information was available. Mr. Blackwell, the city engineer, was a member of the zoning commission, and was sometimes at the meetings of the zoning commission. Mr. Blackwell lives across the street and down towards Kenyon Street from the Galland Home, and is one of the chief objectors to having a home of that character located in that community. (St. p. 112.) I do not recall that he raised any question about this home at the time we were zoning this district. No provision was made for the continuance of this home there, excepting that it was permitted to remain. It was actually by the terms of the original ordinance made a non-conforming use.

Thereupon the following occurred:

Q. But, during the time that you were zoning this district, you figured that the home, as it was then being operated, and as it is now being operated, was entirely and in every way free from any danger to the city, or free from contaminating the morals of the city, didn't you?

A. No, Mr. Shank, because we had to base our classification on these particular factors, and draw the lines of demarcation as between the various uses. On the one hand, single residence dwellings; on the other hand, multiple family dwellings. There was some line or characteristics determining those that should go on the left hand side of the line, and that the other uses or the dwellings should go on the right hand side.

Q. Using Biblical terms: that they separate the sheep from the goats?

A. We made separations as between the various uses in [fol. 85] the city.

Q. Now, I want to know a little bit more, Mr. Gaines, about what you considered regarding this home. You had in mind, didn't you—you had it in mind?

A. In common with other institutions and uses, certainly.

Q. Did there ever come to you personally,—directly or indirectly, a report that the people immediately surrounding the home objected to it?

A. I don't think so,—in the original preparation of the ordinance. (St. p. 114.)

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Q. Now, Mr. Gaines, you are an expert on zoning, and have made a study of that, you say, which I think we will all admit. In the determination of uses, did you have in mind any particular legal factors that you must observe in order to make the law a valid law?

A. Legal factors are, of course, to be taken into consideration always.

Q. Now you studied the cases, you say, as they came out, and tried to keep yourself abreast of the times on the legal requirements?

A. Attempted to; yes, sir.

Q. What did you find to be the legal requirements in order to make a zoning ordinance valid?

A. That it should have a traceable relation to the best health, safety, morals and general welfare.

Q. A direct, traceable relation to those four factors; that is correct, is it?

A. Yes, sir.

Q. Now, as an expert on zoning, I wish you would advise the court and all of us what you would say with reference [fol. 86] to this home, regarding its safety. Is it unsafe,—is it an unsafe institution in that locality? (St. p. 115.)

• • • • • • •

A. The factors which determine classification——

Q. Now, Mr. Gaines, you have a right to explain after you answer my question. And, I would like to have an answer to that question, because you are an intelligent gentleman and can answer it directly. And, after you have answered it directly, if you desire to qualify it or explain it, that is your privilege as a witness; but, up to that time, I want an answer to my question.

A. An institution of that kind may be less safe than a single family home or dwelling.

Q. I am not talking about what it might be or might not be, but I am talking about what this institution is. We have there an established institution which you, as a member of the zoning commission, have sought to zone out of the community. Now, upon your own answer, it must relate itself directly to the four things, safety, morals, health and general welfare; and I want to know from you now what our institution is with reference to those four things. And, I am asking you first as to its safety. Wherein is that institution unsafe?

A. You can scarcely consider this one institution as an isolated case, because we have got to consider those institutions as one of a class in classifying property for zoning, and it belongs to a class which is less safe.

* * * * * * *

Q. Now, I want to know what other institution there is in the city of Seattle of a like class; do you know of any other?

[fol. 87] A. It depends on how far the likeness goes.

Q. Do you know of any other?

A. There is none other exactly like it in every respect. (St. p. 117.) That is impossible.

Q. Name one that is very much like it.

A. A Philanthropic Children's Home.

Q. I am asking you to name things specifically, not generally, Mr. Gaines. You zoned this city, and you were the executive secretary and the engineer, and you say you are well familiar with the situation. I want you to name one.

A. Well, the Mother Ryther Home is comparable.

Q. How did you zone that?

A. It is in the same class with this.

Q. You did? You put it in the same class?

A. Yes, sir.

Q. Name another one. Mother Ryther's Home—that is an orphanage, is it not?

A. Yes.

Q. For children. All right; name another one.

A. The Kenney Home.

Q. How did you zone that?

A. In the same class with this.

Q. Did you zone that particular block on which it exists, and make all the rest of the property around it first residence district?

A. It is zoned as first residence district.

Q. The Kenney Home?

A. Yes, sir.

Q. As first residence district?

A. Yes, sir.

Q. How is Mother Ryther's Home zoned?

[fol. 88] A. I believe that particular home is located in a business (St. p. 118) district, if I recall correctly. Not because of the home's being there, but because the property is properly business property.

Q. By the way, what plate is the Kenney Home on, Mr. Gaines?

A. Plate 18.

* * * * * * *

Q. Mother Ryther's Home. How did you zone that?

A. Oh, that is situated in a business district.

Q. I am asking you how you zoned it.

A. In what classification it is placed?

Q. Yes.

A. All homes of that character were originally delegated to a second class district. Later, special permission was given them in a first residence district, under certain conditions.

Q. I am asking you how you originally zoned it.

A. Placed it in a second residence classification.

Q. How did you zone the convent on Eighteenth Avenue, —the convent and school on Eighteenth Avenue? How did you zone that?

A. Will you tell me just where that is located?

Q. On Plate seven or eight,—on Eighteenth Avenue North. It is Plate eight, Mr. Gaines.

A. First residence district,—if that is the institution.

Q. In other words, that convent and boarding school for girls where they live out there.

A. Just a moment; I believe you have not correctly indicated (St. P. 119) it, Mr. Shank. You indicated a use on Twenty-first Avenue,—a school on Twenty-first.

Q. Between Twenty-first and Twenty-second.

[fol. 89] A. Is that the location?

Q. I think so.

A. Then, it was zoned first residence.

Q. Yes, first residence. Now, I come back, Mr. Gaines——.

A. Schools, by the way, are permitted in a first residence district.

Q. I wish you would turn to the plate containing the House of the Good Shepherd. I think that is on Plate 2.

A. Yes.

Q. How did you zone the House of the Good Shepherd?

A. Second residence.

Q. And all about it, it is surrounded by first residence district?

A. Yes, sir.

Q. How did you zone the orphanage,—the Catholic orphanage out in the northern part of the city, as shown in Plate one?

A. Second residence district.

Q. And all about it is first residence district?

A. Yes, sir. The attempt was made, Mr. Shank, to provide for all of the uses,—legitimate uses,—of mankind, you might say, here in the city.

Q. Why did you then zone this particular five acre tract as you did? Why didn't you zone this five acre tract so that it might be utilized for what it was being used for, the same as these other tracts?

A. The commission considered it a different class of property (St. p. 120) Mr. Shank.

Q. Now then, I come back to my original question. I want you to state to the court wherein you consider the maintenance of that home of ours out there unsafe; or, did you consider it unsafe?

[fol. 90] A. We considered that sort of an institution belonged to a class of building which, as a class, were less safe.

Q. I am not asking you about "less safe." A first residence house with a smokestack made of sheet iron is less safe than one with a brick flue, isn't it?

A. Yes; from the standpoint of fire hazard.

Q. Now, did you, in fact, in your investigation as a Zoning Commission find anything that caused you to believe that that Home was unsafe? (St. p. 121)

Q. Now, Mr. Gaines, can you mention any point in which this home is unsafe to the community?

Mr. Beals: I renew my objection, if Your Honor please. I think that is exactly the same question. Your Honor must bear in mind that the zoning commission did not go into each house and store building and go through it. They classified those things. That is the principle of zoning.

(Argument by respective counsel.)

The Court: Well, I consider it so. You may inquire as to the reasons why it was zoned in a certain way. I think that will develop the situation sufficiently.

Mr. Shank: I would like a ruling on my question, Your Honor.

The Court: I will sustain the objection.

Mr. Shank: Exception, please.

The Court: Exception allowed. (St. p. 123)

* * * * * * *

Q. Mr. Gaines, did the zoning of this property out there, at the time you zoned it,—did you attempt, as it related itself to this home, to figure out the question of the morals or the safety or the health or the general welfare of the [fol. 91] community?

A. We did that in all cases of zoning.

Q. I am not talking about "in all cases"; I am talking about this particular property.

A. That is one of the "all."

Q. Yes. Did you have in mind this particular piece of property when you zoned that district out there?

A. As one of a class, yes.

Q. Did you know of this particular piece of property being used as a home at the time you zoned that?

A. That showed plainly on the face of our map. (St. p. 127.)

* * * * * * *

Q. Mr. Gaines, when you zoned that property, did you take into consideration specifically as it related to this home the health, the morals, or the safety, or the general

A. Mr. Shank, we did, in placing the classification as we did. We placed, on the one side, the dwellings and their

appurtenant buildings and accessory uses, and on the other side multiple family dwellings and their accessory uses and things incidental and comparable with those uses.

Q. Did you find, in fact,—Now, I am coming back to the same question. I mean no discourtesy to the Court; but I want to proceed and ask my questions, and the Court will appleciate I simply feel that it is my duty under the situation that now exists.

Did you find that this home in anywise affected the morals of the city? (St. p. 128.)

* * * * * * *

A. We found that that use belonged to a class of uses which were less conducive to the morals of the community [fol. 92] than the uses which were placed on the other side of the list.

Q. Now, did you understand my question?

A. Yes, sir. (St. p. 130.)

* * * * * * *

Q. In what way is the use of a piece of property to house elderly people less conducive to morals than otherwise?

A. It is probably not, if located in the right district; but if located in the same district and intermingled with homes there is a certain influence there,—call it spiritual if you will, or evanescent if you will, nevertheless, it is absolutely real.

Q. That affects the morals of the community?

A. Yes, sir, particularly in the matter of the rearing of children upon whom is to rest the future of the country.

Q. In other words, to have some old folks around children is harmful to the life of the children, is that it?

A. In the particular manner of intermingling, such as here, yes.

Q. Do you know whether there has been any intermingling out there?

A. There could scarcely avoid being any in the ultimate.

Q. But you don't know that there was any intermingling? (St. p. 131.)

* * * * * * *

A. As a result of later developments, yes. I have been so informed.

Q. When?

A. At a time when this particular matter came up for reclassification of this property,—later on.

Q. But, at the time of the zoning, you had no opinion upon that point?

A. Not as to this particular home as such.

[fol. 93] Q. Now then, it relates, as I gather it, to the æsthetic sentiment of the community, and you think, in that way, it affects the morals of the community?

A. Not the æsthetic.

Q. Well, you said "spiritual". I thought perhaps the spiritual and the æsthetic might bear some relation to each other. What do you mean by the spiritual effect upon the children?

A. The elements which go to make up the general character of the child. Speaking as a class, both as to the home and as to the rearing of children,—and the home influences. (St. p. 132.)

. . . . . .

Q. Mr. Gaines, at the time this zoning ordinance was prepared and before its passage, you did not specifically investigate the question of the health of the community as it might be affected by this home or its existence, did you? (St. p. 136.)

A. Narrowly speaking, in the particular instance of this particular home, I might say no.

Q. What do you mean by "broadly speaking?" How does it broadly affect the health of the community?

A. Those things have to be considered in the matter of zoning as classes.

Q. No. I am asking you now about a fact. How does the existence of the home, broadly speaking, affect the health of the community?

A. In the opinion of the commission and myself, the multiplication,—the extension of this and similar uses, as a class, intermingled with the uses of a first residence district, tends to deleteriously affect the health of the community.

[fol. 94] Q. That tract of land is about five acres in extent, is it not?

A. Yes, sir.

Q. If it were cut up into lots, you could place upon that property a number of homes whose population would greatly outnumber the population resultant from the contemplated use of this new building, could you not?

A. Yes; but not the possible use of this property in this manner.

Q. I am not speaking about the possible use; I am speaking (St. p. 137) about the use of it for the home we are proposing to build that will house thirty people.

A. We also had, however, Mr. Shank, to take into consideration the possibility of extension.

Q. I am speaking now of this one extension, Mr. Gaines, which the evidence shows has a capacity of thirty as a limit. Do you mean to say to the court that the development of this home, and the building of it with a population such as has been testified to here, would affect the health of the community?

* * * * * * *

A. I don't know.

Q. With reference to the safety of the community, would you say that that building, or the maintenance of such a home would affect the safety of the community?

A. Under the particular conditions you have just outlined for this other?

Q. Yes; the same conditions as I outlined in the other question.

A. Narrowly speaking, and in this specific instance, I do not know.

Q. With the same conditions that I have outlined in that [fol. 95] question, Mr. Gaines, would you say that it affected the general welfare of the community,—under those conditions? (St. p. 139.)

A. Broadly speaking, I believe it would. Narrowly speaking, and just from the broad materiality,—from the standpoint of putting my finger on the broad causes of disease, I could not say. I don't know.

Q. You say "broadly speaking." What do you mean by "broadly speaking?"

A. Taking into consideration those great factors for the upbuilding of the city.

Q. What factors?

A. General welfare includes so many, I am scarcely able to enumerate them.

Q. Name some of them.

A. One thing, the happiness of the people. People's worry and unhappiness tends toward a lessening of the general welfare.

Q. Name some more. Do you think of any more just at the present time?

A. The general surroundings of people in their home life is interfered with in a general way by institutions of such a character as this.

Q. In other words, the individual man would prefer not to be next to such an institution; that is your idea?

A. Not only "not prefer," but they have such an aversion to institutions of various kinds, and the things which are listed in a second residence district area that they will actually move away at a great loss to themselves rather than remain there.

Q. The home is there now?

A. Yes.

Q. And would there be more aversion to the home if there [fol. 96] was (St. p. 139) a nice building there, such as proposed, than if there was an old building there, such as there is now?

A. The conditions relating to non-conforming uses have to be made general and apply to an enormous number of different things; and under those provisions which we were told were necessary to maintain the legality and justice of the ordinance, those conditions had to be outlined substantially as they are outlined. The permitting of the building of new uses, which are not permitted, would, of course, be destructive to the very spirit of zoning, and we could not maintain zoning.

Q. You did not answer the question again, Mr. Gaines, and I would like for you to pay attention to it. Would the building of a new structure, such as we are now proposing, interfere with the general welfare of the community more greatly than the maintenance of the home in its present status?

A. Speaking in the sense I would have to consider it in zoning, yes.

Q. In what way?

A. Because it is a part of a general class, and the spirit of zoning could not permit those indiscriminate interminglings; in fact, it is designed to prevent those interminglings of things which have been classified one on one side and the other on the other side of the lines (S.. p. 140) of demarcation.

Q. That is your answer; and that is the only way in which it will affect it, is it?

A. I don't know.

Q. Mr. Gaines, you referred to several localities where we might establish this home. I think you mentioned the hillside east of,—from Lake Washington Boulevard west on [fol. 97] that side hill, and north of east Madison?

A. Yes.

Q. Where could we locate a home in there? Take your plate, will you, that embraces that territory, and point out to us where we could locate a home there with five acres that would be as desirable as where we are.

A. I didn't say you could locate a home with five acres there. However, it is my belief that you even could, because the property is of little commercial value.

Q. Well, take your plate, please, Mr. Gaines, and point out what particular property we could get. Give me the number of the plate, will you please?

A. I would not attempt to do that, Mr. Shank.

Q. How is that?

A. I would not attempt to do that,—specifically that, without further investigation? I told you it was my belief that could be done.

Q. Do you know of any particular property in that district that could be obtained for a home?

A. Not specifically.

Q. Do you know of any particular property in any of these districts that you mentioned that could be obtained for a home,—that is, in a good residence district? (St. p. 141.)

A. Yes, sir.

Q. Where?

A. On Beacon Hill.

Q. On Beacon Hill?

A. Yes, sir.

Q. Is it as desirable property for old folks as our present home?

[fol. 98] A. It conforms to the measure laid down by Mr. Cooper, who spoke of the things he was looking for in the establishment of this home.

Q. Now, answer the question, Mr. Gaines; is it as good property, or as beautiful property as the property we have?

A. I do not think so.

Q. No. It has no lake frontage, has it?

A. No.

Q. Have you looked at the property?

A. Which?

Q. This property you say we could get?

A. Yes.

Q. You have seen it, have you?

A. Yes.

Q. You have gone into the question to determine whether you could move that home out there?

A. Not as to moving any home, but it could be purchased and such use established.

Q. What was the occasion of your inquiring about it?

A. It was suggested by some of the people in the vicinity that the home should be established elsewhere.

Q. The vicinity of the present home?

A. Yes.

Q. And did they ask you to go out and look up another location for it?

A. No. I wished to assure myself of the reasonableness of these regulations.

Q. Now, as to the reason you went and looked up a special location for this home,—is that the reason?

A. Yes.

Q. To be sure you could find a place where the home could [fol. 99] be moved?

A. Where a similar institution could be established and would seem to me to be a proper location and conform to these factors.

Q. Did you ever conduct an old folks' home?

A. No, sir.

Q. And yet you think you were qualified to go out and select a spot for an old folks' home?

A. I do not say it was the most desirable spot; but a suitable location.

Q. What was it, within a second residence district?

A. Some of this was first residence and some second. However, first I looked for property held in such holdings that the requisite consent would be given without question.

A. If you were to build a building on such property as that, and wanted to put up another unit in fifteen or twenty years, and the property was settled around it, you would have to get the consent again, wouldn't you?

A. Under the present form of zoning,—in some cases——.

The Court: Well, that is a question of law. (St. p. 143.)

The Witness: I might say, in some of the locations being in a second residence district, if the law would not change, it would not be necessary.

Q. This location out here in South Seattle, is that in a first residence district?

A. Beacon Hill?

Q. No, you spoke yesterday of south of Georgetown.

A. Yes. That is in a first residence district.

Q. That is first residence district?

A. Yes, sir.

Q. And you spoke of Avalon Way; is that first residence?

[fol. 100] A. Second residence.

Q. You spoke of east of Admiral Way; is that first residence district?

A. That is first residence; part of it is second, however, where such a use might be established.

Q. You think that the spiritual and aesthetic effect upon the people of these other first resident districts would not be the same as it is in this first residence district where the home is now located; is that correct?

A. Those districts which are already zoned second residence district, do not have the same character as the first residence district. The portions which are zoned first residence district are unsettled now, and anyone coming in

there would come in with the full understanding of what they were coming next to, if such a use was already established.

Q. Originally, this ordinance prohibited such homes as this in any first residence district, didn't it? (St. p. 144.)

A. Yes, sir.

Q. And then an application was made by the Trust Company for a modification of the ordinance, permitting a reclassification, so as to enable them to build this home. That is correct, is it?

A. Yes, sir.

Q. After that application was made, then on the recommendation of the Zoning Commission, there was an amendment made to the first residence district provision, was there not?

A. Yes, sir.

Q. And that amendment was to the effect that you should secure the consent of two third- of the property owners within a distance of four hundred feet of the proposed building?

A. Yes, sir.

[fol. 101] Redirect examination:

Throughout the city there were and there are many non-conforming uses. These exist right along. There has been no attempt made to interfere with those non-conforming uses or stop them under the Zoning law. (St. p. 147.) Mr. J. D. Blackwell the present city engineer, became a member of the Zoning Commission I think in the summer of 1922. I don't know just what date. The Committee had been functioning before that. The fact that the new building would be permanent would affect the question as to whether it would be more objectionable than the maintenance of the old building. We did not take up individual cases throughout the city in determining whether the present uses at that time would conform to health, safety or fire hazards. (St. p. 148.)

J. N. DENNEY, a witness appearing on behalf of the defense, being duly sworn, testified as follows:

My occupation is real estate, loans and appraisals. I have lived in Seattle about twenty-eight years, and have been busily engaged in that business for a little better than twenty years. I have dealt in all kinds of real estate and am in a general way familiar with the Galland Home property, and am familiar with the district of the city in which that institution is situated. That district is a strictly residence district,—first class residence property. The Galland Home tract would advantageously lend itself to platting into smaller tracts for sale for residence purposes. (St. p. 150.) The location in a residence community of an institution similar to this conducted by the plaintiff has a detrimental effect upon residence property of this class. I am speaking now of the value of the property. It has,—any institution of that character,—not speaking of [fol. 102] this especially; but any other of the same character would depreciate the surrounding property in the market value, because it is the environment I think, more than anything else. And I have had experience in that same kind of property. A man goes out to buy a good home. He doesn't want,—while he is in sympathy with the old folks' home,—he doesn't want to be brought face to face with that all the time, or he doesn't want his wife and children in the (St. p. 151) same position. They are looking for better environments and it is almost impossible to sell a nice corner or a nice lot which is across the street or adjoining an institution of that kind. It becomes undesirable as a first residence home.

On cross-examination the witness testified as follows:

When I speak of the depreciation in values of home property, it is true that a large public school would have the same effect upon the desirability of a good home. Any institution has some effect. They vary. (St. p. 152.) Anything of that sort would have an effect upon the value of the adjoining property.

J. R. Miller, a witness for the defense, being duly sworn, testified as follows:

I live at 7536 Seward Park Avenue. (St. p. 153.) It joins this Galland Home on the south. I have owned that place twenty-four years, since 1902, and have been there continuously all the time that this home has been actually established there. I have personally found it very detrimental. It is detrimental particularly in affecting values. As soon as I was advised that my neighbor Dutton had sold his home for an old folks' home, I immediately offered to sell mine, because I railized that it would not maintain any value. I have tried for fourteen years now,—since [fol. 103] the sale was made,—to effect a sale of (St. p. 154) my property. I have had a great many people come and look at it and commend it very much; interested in it; and they would ask me who my neighbors were, and I would reply Mr. Danz on the south and had an old folks' home on the north, and the reply to me has been invariably, "Keep your home." I know that it has affected the sale of surrounding tracts other than mine only by being told so.

Cross-examination:

Before the Dutton sale was made, I refused thirty thousand dollars for my home. That was in 1912. I have approximately three acres with a frontage of one hundred seventy feet on Seward Park Avenue. (St. p. 155.) The Home was established there in 1914, and since that time I have put in the sewers, the road—street—and five thousand dollars assessments, and I have offered the property as low as twenty thousand dollars with the additional expenses. I have tried to sell it for twenty thousand dollars, and I would not hesitate to say I would take much less than that if I could get it. The people from the Home do not come around to bother me particularly. (St. p. 156.)

William A. Eastman, a witness on behalf of the defense, being duly sworn, testified as follows:

I have lived in Seattle twenty-six years. Have been engaged in the general real estate business in the city of Seattle twenty years. For the last sixteen years I have

conducted a general real estate business, handling all branches of the business for myself throughout the entire city. Well, I have had a general experience. For the last two or three years, I have done a great deal of appraising of [fol. 104] various properties throughout the city, both for the city on condemnation suits; for private individuals against the city,—against the county. I have had experience of various nature here. (St. p. 157.) I am familiar with the property known as the Galland Home, and with the portion of the city in which it is situated. That locality is a first class residence section. Such an institution as that conducted by the plaintiff has a very undesirable effect, for a residence section, because people buying ground for homes object to buying a home near an institution of that kind, consequently they will not buy it. The general objection is that in buying property for a home, you want it in a residential section where there is no institution such as this,—and bring up your family. And if you do own property and such an institution is put into the district, of course it has a depreciating effect upon the value of the property. (St. p. 158.) The tract upon which this Home is located by reason of its location, shape, topography, and so on, lends itself to be advantageously platted into smaller tracts for residences. The dimensions of the tract are such that it could be platted very easily, and to good advantage, and sold very readily, I believe. It is a very pretty piece of property.

Cross-examination:

This tract, I should say, could be platted into twenty to twenty-five sixty-foot lots. They usually run about six sixty-foot lots to the acre, allowing for streets. (St. p. 159.) Any institution, like a school, depreciates the value of desirable home property. I would not want to be next to a school, either. A large greenhouse which is used for commercial purposes would be somewhat harmful. Not as much as an institution of this kind, but a greenhouse would have some of the same effect. The surrounding property [fol. 105] would feel a parental school in which wayward girls of the city were committed. There is a greenhouse within two hundred or three hundred feet of this Galland

Home property, facing Seward Park Way, and there is such a parental school half a mile north of this property, situated a little towards the Lake and off the main highway. To the south there is another home for wayward girls known as the Crittenden Home. That location is not comparable, because it is up on the side hill, away from everything. And it is a different class of property. You could not compare that property with this. (St. p. 160.) There are many elements that enter into the question of making home property desirable or undesirable. There has not been any general appreciation of value in that section of town out there. I happen to live there, Mr. Shank. I lived way at the south end of Lake Washington for a good many years; Rainier Valley didn't have any improvements, and the last ten years we are getting some improvements and values are strengthening,—but in this particular district it has always been a first class residence section. For many years people that wanted larger tracts went in here. This desirable residence district continues on north through the lake front. (St. p. 161.) It has always been very desirable, although they had no transportation until recently. There has been some activity in real estate out in that district the last year or so. Not very marked, but there has been more buying since they had transportation down on Seward Park Avenue. I should say that that parental home down there has affected the values of the property surrounding it,—it certainly would affect the value.

Redirect examination:

I most assuredly believe from my experience as a real estate man, appraiser, etc., that the principle of zoning is [fol. 106] advantageous to a city like Seattle, as a whole. I am familiar with our existing zoning ordinance. I would not say that I know the exact wording of the ordinance. Whenever it comes up to where a piece of property is affected I am interested in, of course I refer to the zoning ordinance. It is a matter today of stabilizing values, and a desire to purchase a home in a first class residence section. That is one of the things that determine whether a man will purchase (St. p. 162) a home, and it always enters into it nowadays, when he is looking for a site for a home.

HENRY F. DAILEY, a witness on behalf of the defence, being duly sworn, testified as follows:

I live at 3864 McClellan Street, in the Mount Baker Park District. I have lived within a block, I should say for thirteen and a half years. I have lived in Seattle fourteen years. I have no occupation at the present time. I have been in the general real estate business most of my life in Seattle and Omaha and Minneapolis. (St. p. 163.) I have been a member for a number of years of the Mount Baker Improvement Club. I was president of the club last year. We also have a holding club, Mount Baker Park Club, incorporated, of which I am a member and have been president of that for five years. In the city of Seattle there are a large number of improvement clubs, some sixty odd, I think. They have what we call the Inter-Club; along the west shore of Lake Washington, from the south city limits to the University. I think there is something like twelve clubs associated in that. In that, we take up any subject of general interest to our community along through there. The idea is that each,—what we call the parent club—has three delegates that meet at the Inter-Club once a month, [fol. 107] and there we talk over any subject pertaining to the general interest of the lake front. I have been a delegate for the last year and a half or two years. Ever since it was organized. I was one of the charter members of it. (St. p. 164.) As a member of my local improvement club and a delegate to this Inter-Club Council, I have made some study through my club connection, and more study from a personal interest, and having quite a few investments in the way of mortgages on other properties, which has given me more knowledge of the residential district. I have not engaged in it extensively. I have built three homes.—bought and sold a few others, and worked with some outsiders on some different propositions, but have not maintained an office and an active business. In my opinion zoning is not only advantageous but it is very important to a city like Seattle, because Seattle is unfortunate in not having a great many of what we call restricted districts. In the middle states where I have been connected, we had more restricted districts, and found them very desirable. (St. p. 165.) When I came to Seattle and we decided to

settle here, the first thing we wanted was a home. Well, the next question was where. The next question was, where are your restricted districts, and I found very few of them that were restricted that had kept up their restrictions and were desirable. That is one of the main reasons I settled in Mount Baker Park, on account of the restrictions. I am fairly well acquainted with the portion of the city in which the Galland Home is situated. I would call it a very high class residential district if it was properly restricted or protected. The location of a home similar to this Galland Home has a very detrimental effect on the surrounding property. Of course, the property that is nearest is affected the most, and gradually less and less as you get farther from it. It has a detrimental effect because the desirability of a first class residence district is from the fact [fol. 168] that you have got a uniform class of people. Uniform homes. People that can associate and mingle together. That have common ideas and on friendly (St. p. 166) terms. It makes it desirable to live in that neighborhood. I would consider such an institution as this Home a jarring element in such a community. I would hate very much to have it next to me. It breaks the harmony in a neighborhood. Now, you take that Home,—while we all think a great deal of the old people, and we like to see them taken care of,—nobody thinks more of old people than I do,—at the same time, we do not like in our home neighborhood,—in our homes,—to have those people,—any great number of them constantly before us, every time you look out and every time you turn a corner you meet them, and they are objectionable to a certain extent in a neighborhood for this reason, and they are apt to mingle with the little children. They are, most of them, very, — I say, generally. I don't know these people individually. Never spoke to one of them at all. But, they are apt to mingle with children and give them candy and peanuts (St. p. 167) and so on, and mingle with them in many ways. On the other hand, certain children have a natural tendency to pick on old people, especially if they do not walk quite straight or something like that,—they are apt to pick on them, and that sometimes causes hard feelings and quarrels and creates in them, to a certain extent, a bad habit among children.

Cross-examination:

I think a reverence for old age is a mighty good lesson to teach children. A school would, to a certain extent, have the same effect upon surrounding property as this Home, but not so great. I would certainly think a jail or a penitentiary would have a greater effect than a home such as [fol. 109] we have here. (St. p. 168.) The desirability and the value of the property to a certain extent is affected also by a greenhouse or a commercial institution of any sort. It would be affected by a detention home for girls. I would not like to live right next to this Home, and I don't imagine that you would. One of the reasons why it would not be so desirable is that it is a place where elderly people reside. I would make this distinction between a school and a place of that kind. A school is necessary in every community, and many of the neighbors do not object to a school so much because we have children that we want to send to the school, where we haven't any idea of sending our old people to this particular home, and do not prefer it to the school. If old folks were members of (St. p. 169) my family, I would want them to be located comfortably and agreeably but not too conspicuously. I would rather, if I were going in an old folks' home,—I would rather have it in an isolated neighborhood, or away where they would not constantly see the people that live better or had better homes, and their children and their limousines and all that. I would rather have them away somewhere in a more retired place. If I was going there myself, I would rather be in a less conspicuous place. I would not say that this is a very inconspicuous place. You cannot keep the old people right around the building. They wander around. The minute they step out on the street they are on a very busy highway,—right in other people's front dooryard. If I owned property adjoining this Home, I would consider it less desirable to have a Home there with a hundred thousand dollar, fine, class-A building, than to have it there in its present condition because you would have from two to four times as many (St. p. 170) people around as you would have with the ordinary home. There is one other reason. The minute [fol. 110] you put a hundred thousand dollar home there you have made it permanent. It is there for all time. There is no prospect of it going away. It might be permanent

now, but not so apt to be. It does not cut much figure that the old building is more of a fire hazard than a fire-proof building would be. I don't think it would increase the insurance to amount to anything, and with our able Fire Departments in this city, they do not let fire spread much, particularly at the present time because of the large spaces there are between the dwellings. A dwelling could not get very close to a piece of property that is five acres in extent. It is a question of where you would build on the five acres.

REBUTTAL.

O. B. THORGRIMSON, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

I am a member of the School Board of the City of Seattle. This is my fourth year on that Board. The parental school for girls was established in the Rainier District about five years ago. We have something less than five acres; I think it is about three acres. (St. p. 173.) It is a part of what was originally Judge Everett Smith's home. We refer to it as the Girls Parental School. Neglected girls and certain girls who get in trouble at school are reported to the juvenile court and the court commits them to our care in that institution—under a certain age,—I think sixteen is the limit. The Juvenile Court commits them to the care of the School Board, and then the School Board places them in this detention home. They are never committed there for a definite time, but they have a parole age. A great many of them are merely neglected. There is nobody to take care of them. They are paroled through the school [fol. 111] authorities. (St. p. 174.) Or the matron, or superintendent of the Home, through the central superintendent's office. Sixteen is the maximum age at which girls are received there, and I think we have some as young as seven or eight. The number of girls runs between forty and fifty. That home is located about half a mile north and a little distance east of the Galland Home. I live in that district about three blocks from the Galland Home, north. I built my home out there a year ago. (St. p. 175.) I want to state that I presume from the question that

counsel asked, he expects to show I have no objection to the Home. I want to state that our particular district, adjacent to this particular home,—there is quite an impression,—it divides it to quite a large extent.

Decision

On Tuesday, July 27, 1926, the Court rendered the following oral decision:

It appears from the evidence in this case that under the will of Caroline Kline Galland, a large amount of property was left the trustee for specific charitable purposes, among which was a home for aged and feeble poor; and upon the property described in the petition a home has been established which was purchased twelve or fourteen years ago at an expense of about twenty-five thousand dollars. That this home has been used and occupied as a home for that purpose since that date, accommodating between fourteen and fifteen cases or guests in this particular home. That the home has been operated in a very considerate manner, and with a great deal of consideration for the welfare of the guests of the home. The Court, at the instance of counsel, viewed the property and found it a very beautiful [fol. 112] place, and well adapted for the purposes for which it was purchased. It presents a very fine appearance from the street, and is an ideal site.

It is proposed to increase the size of this building to accommodate twenty-five or thirty guests. In order to do that, it is necessary to secure a building permit from the City of Seattle. The home which it is proposed to construct, would be a beautiful structure. A building permit was refused by the defendant in this case, because, in the opinion of the building superintendent, it was not proper to issue that permit, it being in conflict with the ordinance known as the zoning ordinance of the City of Seattle. The zoning ordinance was adopted some three years ago after an extensive study by the zoning commission which occupied nearly two years. It appears from the evidence that numerous hearings were held in various sections of the city, and a certain comprehensive scheme was proposed as

to zoning the different sections of the city, and providing as to what uses the property could be put. This report of the zoning commission was subsequently adopted and incorporated in and made the zoning law of the city.

The question presented is one difficult for the Court. Very engaging arguments are made by counsel on both sides of the question, all of which have appealed in a conflicting way to the Court. On one side it is said that to refuse to grant a writ as prayed for in this case will be to affect the elderly people who will be inmates of this home, and, of course, that argument makes a very strong appeal to me, and would to any court, because if there is one thing we have been taught, it is to have reverence and respect and consideration for old age, and to endeavor to make the last years of a useful life as pleasant as possible. On the other hand, there are those people who believe it would be detri- [fol. 113] mental to the welfare of their district to have this home established in that district. It has been difficult, and is difficult, for anyone to express those reasons which actuate them and those motives which actuate them to feel as they do feel regarding an institution of this character. Under the zoning ordinance, the home it is proposed to build is in conflict with the provisions providing for a first residence district, and, if the ordinance is valid,—if its provisions are reasonable and not arbitrary, then the Building Superintendent of the City of Seattle properly refused to issue the permit.

At one point in the argument, counsel for the plaintiff in this case referred to the fact that perhaps there was prejudice in the case for the reason that this home was created for Jewish people. Whatever foundation there is for that does not appear in the evidence. It is one of those conclusions that counsel sometimes draw as to motives which actuate people for perhaps opposing a certain thing which he is advocating. I do not consider the fact that this is a Jewish Home has anything to do with the case. They are entitled to the same rights and the same privileges and the same protection as any other race or class of people, and courts must consider that they have the same rights and the same privileges as any other class would (St. p. 180) be entitled to.

Numerous cases have been cited by counsel relating to the decisions of other courts which have upheld or refused

to uphold the zoning law. My own conclusion is that, as a whole, the zoning laws are constitutional, and I will hold that this law is constitutional. The only question which I think is involved in this proceeding is whether the provisions of the law are reasonable and not arbitrary,—it is the only basis upon which the provisions of this law could be at- [fol. 114] tacked by the plaintiff in this case. In passing upon the question of the reasonableness or unreasonableness of the law, I do not take into consideration, except in a general way, the cases which have been cited relating to business establishments, such as laundries, brickyards, and manufacturing or factory purposes, because I think it must be conceded that those particular regulations are proper. Passing upon this question of the reasonableness of these provisions, as I said before, it is a very difficult question for me to decide. I have studied the briefs that counsel have submitted, and I have read most of the cases, and my conclusion is this: the zoning law was adopted after more than two years of study by the Zoning Commission. In order for me to set this law aside, I must find, as the Court said in a late California case,—I must pass upon the question of (St. p. 181) whether, as a legislative matter, there has been a reasonable exercise of legislative authority. In other words, should I substitute my judgment for that of the legislative body of the City of Seattle, unless it was a question upon which reasonable minds would not differ?

Now, as much as I sympathize with the position of the plaintiff, it does not appeal to me that with the meager amount of evidence that there is in this case, or with the little opportunity there has been to study the zoning plan adopted by the City of Seattle, that I should substitute my judgment for that of the Zoning Commission, or that of the city council of the City of Seattle. The argument is appealing to the court, and it is one that I hate to refuse, but I feel that I must view this situation in the light of the provisions of the will of Caroline Kline Galland. I must view the situation that this is not the only improvement that may be asked for upon this property. Now, if this [fol. 115] matter were to stop with this one improvement, it might not have a very serious effect upon people there; but, if the improvement or development is to continue along the lines suggested by the will, then we would have two or

three buildings perhaps more, upon this property, situated in this neighborhood which is desirable for residence purposes. So that, if viewed in that light, one would feel that the objections made by the City of Seattle, and as (St. p. 182) shown by the testimony of the defendant here, would have the greater force and the greater weight, as the case now stands.

I feel that I should follow the decision of the court of California in Zahn versus Board of Public Works, wherein the court says:

"That courts are loath to substitute their judgment as to the necessity for a particular enactment for the legislative judgment as to the need of such enactment with reference to the exercise of the police power. A large discretion is vested in the legislative branch of the government with reference to the exercise of the police power. * * * Every intendment is to be indulged by the courts in favor of the validity of its exercise, and, unless the measure is clearly oppressive, it will be deemed to be within the purview of that power. It is only when it is palpable that the measure in controversy has no real or substantial relation to the public health, safety, morals or general welfare that it will be nullified by the courts."

I cannot find that the zoning ordinance is so clearly oppressive and unreasonable as to justify me in granting the relief prayed for. The writ, therefore, will be denied.

Mr. Shank. The court will record an exception?
The Court: Certainly, Mr. Shank.

[fol. 116] Order of Substitution of Party Defendant

On the 23rd day of September, 1926, pursuant to stipulation between the parties, the court entered an order substituting George W. Roberge as Superintendent of Buildings of the City of Seattle, a municipal corporation, as party defendant in place of R. L. Proctor as Superintendent of Buildings of the City of Seattle, a municipal corporation, in order that the said case should proceed further in the name of George W. Roberge as Superintendent of Buildings of the City of Seattle, a municipal corporation.

JUDGMENT

On the 25th day of September, 1926, judgment was entered ordering that the plaintiff's application for peremptory writ of mandate be denied and that the cause be dismissed with prejudice and the costs to be taxed against the plaintiff, to which the plaintiff excepted and to all thereof.

[fols. 117 & 117a] NOTE OF APPEAL

On the 15th day of November, 1926, the appellant appealed from the said judgment by duly serving on the respondent his notice of appeal, and on the 15th day of November, 1926 filed its bond on appeal conditioned as a cost bond. The transcript on appeal was prepared and filed in the office of the Clerk of the Superior Court on the 26th day of Nov., 1926. The appellant's proposed statement of facts was filed on the 29th day of September, 1926 and was duly served on the 29th day of September, 1926. No amendments to the statement of facts were proposed by the respondent, and the statement of facts was settled and certified by the trial judge on the 26th day of November, 1926.

Shank, Belt & Fairbrook, Attorneys for Appellants.

[fol. 118] IN SUPREME COURT OF WASHINGTON, EN BANC

No. 20380

THE STATE OF WASHINGTON on the Relation of SEATTLE Title Trust Company, as Trustee under the Last Will and Testament of Caroline Kline Galland, Deceased, Appellant,

v.

GEORGE W. ROBERGE, as Superintendent of Buildings of the City of Seattle, a Municipal Corporation, Respondent

OPINION—Filed June 8, 1927

Caroline Galland who died in Seattle about twenty years ago left a will in which she devised an estate of approxi-

mately one million dollars in trust to the Seattle Trust and Title Company for certain purposes, one of which was the purchase of a site for the erection and maintenance of a home to be known as "The Caroline Kline Galland Home for Aged and Feeble Poor." The will provided that those admitted to the Home should be aged and feeble men and women, and the intent was that it should be managed in such a way as to bring to the inmates the greatest degree of contentment and happiness in their declining years. Pursuant to the will, the Trustee purchased a tract of five acres on a ridge overlooking Lake Washington, and has maintained continuously since 1914 a home thereon conforming to the testator's desires. In 1926 the Trustee decided to remove the frame building used as a home thereon, and erect in its place a modern brick building having a capacity sufficient to care for twice as many inmates as the present home.

Application was made to the respondent for a building permit which was refused upon the ground that in 1923 the city of Seattle had enacted a zoning ordinance which prohibited the construction of a building for the intended purpose at the point desired.

[fol. 119] Action in mandamus was then begun to compel the issuance of the permit, and after hearing, the trial court refused the writ and this appeal followed.

The main contention made upon appeal does not question the validity of the ordinance considered as a whole, but raises the point of whether it is arbitrary and unreasonable as applied to the particular institution involved, and in that respect violates Article I, Sections 3, 7, 12, 16 and 23 of the State Constitution, and the Fifth and Fourteenth Amendments to the Federal Constitution.

The ordinance is too long to permit even a detailed resume of its provisions, but in brief it may be said to divide the City of Seattle into six districts, known as "use districts," and provides to what use property may be put in each district. The uses are cumulative, i. e., each district includes as permissive all those uses which by ordinance are permitted in a higher use district, but not for those of a lower use. Thus, the property in District 6 may be used for all the purposes provided therein, and also for those in the previous five districts. Likewise, property in District 5 can be used for all purposes mentioned therein and

for those of numbers 1, 2, 3, and 4, but not for those of No. 6.

The building sought to be erected is to take the place of the one now on the property, and is, by ordinance, within District No. 1, known as a First Residence District. The ordinance permits in that district single family dwellings, public schools, private schools of a prescribed character, churches, parks and playgrounds, art galleries, libraries, private conservatories and railroad and shelter stations.

District No. 2 permits along with many others the use of property for philanthropic institutions of the character of the one under discussion. It also provides in the ordinance that:

[fol. 120] "(c) A philanthropic home for children or for old people shall be permitted in the First Residence District when the written consent shall have been obtained of the owners of two-thirds (2/3) of the property within four hundred feet of the proposed building."

The relator was unable to secure the consent of the property owners to erect this building in the First Use District as required by the ordinance.

The ordinance also had a provision exempting the property here in question from the ordinance under certain conditions, as follows:

"(b) Subject to the provisions of Paragraph (a) and (f) of this Section, the lawful use of a building or premises existing at the time of the adoption of this ordinance, but not conforming to the provisions for the use district within which it is located may continue, provided, that no structural alterations are made, except such as the Superintendent of Buildings shall deem necessary for the safety of the building. The combined cost of all alterations and repairs in any ten year period shall not exceed the assessed valuation of the building at the time the last allowable permit is applied for."

It will thus be seen that as long as relator desires to continue to use the present building for present purposes it may be so, but that when a new building is to be erected as is now desired, the ordinance prohibits it.

We have never called upon to pass on the constitutionality of a zoning ordinance of this character before, and we need not enter into an involved discussion of it now because relator has frankly conceded that the vast majority of courts have upheld zoning ordinances and the recent decision of the United States Supreme Court in Village of Euclid, Ohio, v. Ambler Realty Co. 272 U. S. 365, has set at rest the question of the right of cities to enact such legislation.

But relator finds objection to the ordinance because as it contends, there is no justification for the placing of such an institution as the one in question in the second residence use district, and forbidding it to be erected in the first residence district.

[fol. 121] The argument seems to be that an institution of this character is not such that it should be forbidden alongside single family residences in the first district. It is said that the character of the building to be erected is such as to beautify the grounds and therefore it will not be an eyesore to the neighbors; that the institution is carefully managed and that the inmates thereof so conduct themselves that they do not interfere with those round about them; that it will be the only one of its kind in the neighborhood, and that it will be located on a large tract of land thereby separating the building from private dwellings by the width of the large side yards.

In determining this question it must be remembered that the legislative authority cannot deal in myriads of details, and that its paramount duty is to determine the classification of uses. In this case that authority has designated the class with which we have here to deal as "philanthropic institutions." It is undenied that this Home comes strictly under that class.

Now must the ordinance go further and divide and subdivide ad infinitum all the various degrees of the particular classification until there arrives a twilight zone where no one can say whether a given use should come within one classification or another? Or must the courts in construing the ordinance do the same thing? For instance, applying it to the present case must we say that, while it is perfectly proper that philanthropic institutions be placed in second use districts, yet, if the particular institution desires to

erect a beautiful building than it shall be taken from the second and placed in the first? Or, if the evidence shows that the inmates interfere none whatever with the occupants of adjoining residences, the class shall be changed? Or, if this be the only one in the district, the lessening of the value of adjoining property will be so slight that the class should be altered, or that if it be erected on a wide [fol. 122] expanse of ground the contact with other persons will be small and perforce this will be a reason for changing the classification? Or, that all these things can combine in a given case and thus upset the provisions of the ordinance? Of course it is apparent that even the character of the buildings will change in time, and perhaps that which might be beautiful when erected will reach a point where it becomes not only an eyesore, but a firetrap; that the inmates of today who do not molest their neighbors will be supplanted by others who may not be so meticulous of the rights and feeling of others; that if the present building may be erected others of like character may also be erected all over the same district; and its character as a first residence district primarily intended for single family dwellings entirely destroyed; and the wide expanse of ground which might now separate the new building from adjoining residences be either filled with additional buildings of like character by the relator or the ground disposed of to others.

It must be apparent that the most that can be said for relator's contention is that this institution is perhaps the least objectionable of all the philanthropic institutions, but when that is said and full consideration given to the argument it furnishes us no reason for embarking upon a whittling expedition the result of which will carve the heart out of the ordinance, leave it indefinite and uncertain, and require every application for a different classification to be decided upon a consideration of whether the thing sought to be done is the least objectionable of its class, and whether, in view of all the circumstances, it may remain so in the years to come. Upon such a theory why might not the respondent determine that any certain applicant was the most objectionable of its class, and thereby relegate it to a lower classification.

Surely this cannot be done. Our duty is to answer two questions: first, has the legislative body power to make

[fol. 123] such a classification? Secondly, does the relator's proposed building belong to the class? Relator hardly denies that these questions must be answered in the affirmative. We conclude that they must, and there our inquiry must stop, for we shall not substitute our own judgment for the council in determining whether we as the enacting authority would have made the same classification or not. But it requires no argument to demonstrate that the classification as such is properly made. To say that such an institution does not destroy the value of surrounding property for strictly home purposes is to deny that which we all know to be a fact, and it matters little whether the objections arise out of the conduct of the institution or its inmates or the æsthetic taste of the persons desiring to maintain homes and rear their families under congenial surroundings, and influences.

The æsthetic taste is not to be frowned on nor classed as prejudice. The spirit which motivated the will to provide a home for the aged and feeble was certainly of the highest, but not all things conceived even in the loftiest of aspirations and ideals become thereby suitable associations in all other places or for all other purposes. Examples of this readily occur to the mind.

It remained for the United States Supreme Court in the case of Village of Euclid, Ohio v. Ambler Realty Co., supra, to succinctly and clearly express this viewpoint when, in discussing this very question, it said: "A nuisance may — the right thing in the wrong place. * * *"

But even if the question as to whether the classification was proper or not was one upon which there might fairly be a difference of opinion, still we would not be justified in setting it aside. In the same case the court proceeded:

[fol. 124] "If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control. Radice v. New York, 264 U. S., 292, 294. * * * Here * * * the exclusion is in general terms of all industrial establishments, and it may thereby happen that not only offensive or dangerous industries will be excluded but those which are neither offensive nor dangerous will share the same fate. But this is no more than happens in respect of many practices—forbidding laws which this court has upheld, although drawn in

general terms so as to include individual cases that may turn out to be analogous in themselves. * * * The inclusion of a reasonable margin to insure effective enforcement, will not put upon a law, otherwise valid, the stamp of invalidity. Such laws may also find their justification in the fact that, in some fields, the bad fades into the good by such insensible degrees that the two are not capable of being readily distinguished and separated in terms of legislation."

In that case the court specifically upheld the provisions of the ordinance in question prohibiting apartment houses in the residential district. We think it must be readily conceded that an apartment house would be far more desirable than a charitable institution in a residential district.

The decision of the California Supreme Court, in Miller v. Board of Public Works of Los Angeles, 234 Pac. 381, is also illuminating, and the arguments advanced for sustaining the character of legislation so cogent that we are constrained to quote a portion of it.

"In addition to all that has been said in support of the constitutionality of Residential Zoning, as part of a comprehensive plan, we think it may be safely and sensibly said that justification for residential zoning may in the last analysis be rested upon the protection of the civic and social value of the American home. The establishment of such districts is for the general welfare, because it tends to promote and perpetuate the American Home. It is axiomatic that the welfare, and indeed the very existence, of a nation, depends upon the character and calibre of its citizenry. The character and quality of manhood and womanhood are in a large measure the results of home environment.

"The home and its intrinsic influences are the very foundation of good citizenry, and any factor contributing to the establishment of homes and the fostering of home life doubtless tends to the enhancement, not only of community life, but of the life of the nation as a whole. * * *

"The entrance of one apa-tment house or flat into a district usually means the entrance of others, and, while it may mean an enhancement of value of the adjacent property for the building of similar structures, it detracts from

the value of neighboring property for home building. The man who is seeking to establish a permanent home would not deliberately choose to build next to an apartment house, [fol. 125] and it is common experience that the man who has already built is dissatisfied with his home location and desires a change.

"In other words, the apartment house, tenement, flat, and like structures, tend to the exclusion of homes. The home owner may move to another district, but this may not be a sufficient solution of his problem, for if no protection can be given to strictly home districts—such as is contemplated by a comprehensive and properly constructed zoning plan—he may be forced by the ever increasing encroachment of apartments and flats to relinquish, if not altogether abandon, the benefits emanating from a permanent home site."

See also, City of Aurora v. Burns, 149 N. E. 748; State ex rel. Carter v. Harper, 196 N. W. 451; Britt v. Building Commissioner of Brooklyn, 145 N. E. 269; Wolfson v. Bender, 150 N. E. 120; Bismarck v. Hughes, 208 N. W. 711; Colby v. Board of Adjustment, 255 Pac. 443; Zahn v. Board of Pub. Works, U. S. Supreme Ct., decided May 16, 1927.

Nor does the fact that the restriction made by the ordinance becomes inoperative if the consent of two-thirds of the property owners within a given area be obtained establish that the ordinance is unreasonable, nor does it indicate a delegation of the legislative power of the City.

In Spokane v. Camp, 90 Wash. 554, Pac. 770, there was drawn in question an ordinance of the City of Spokane which prohibited stables within 200 feet of a residence in certain blocks, unless the consent of a majority of the owners of lots fronting on the street was obtained. It was there claimed that the provision requiring consent of property owners was a delegation of the legislative authority. We held against this contention, saying:

"In this case it may readily be seen that the council, recognizing the rights of the residents of the city to be consulted in matters purely local, matters affecting the comfort and even the health of the residents, and the right to have their will reflected in the enactments of their representatives, provided the ordinance for the purpose of meet-

ing the desires of the residents in that regard. The ordinance is prohibitive, but leaves the right of the citizen to waive the prohibition if he chooses. Statutes of this character are common, and while it is generally conceded that the legislature cannot delegate its legislative function, it is well established that it may provide for the operation of a law which it enacts upon the happening of some future act or contingency. The local option laws in their various phases are common instances. While these laws were violently assailed, and in some instances received judicial condemnation, they are now almost universally sustained." [fol. 126] We conclude that the ordinance as drawn and applied is not unreasonable nor arbitrary, and that it should be sustained.

Judgment affirmed.

Askren, J.

We concur: Mackintosh, C. J; French, J.; Main, J.; Mitchell, J.

I dissent: Fullerton, J.

[fol. 127] In Supreme Court of Washington

No. 20380

Dissenting Opinion

Parker, J., dissenting:

I dissent. I think the Zoning ordinance is an unreasonable and an unwarranted interference with the rights of private property as applied to the replacing of this old home building by the proposed new building. I think this is *to* because of the fact that the home has been, and will be in the future, limited in the number of its occupants to a comparatively few persons, so far as the proposed new building replacing the old building will accommodate occupants, there being no other building in connection with the home; in view of the fact that the new building will be practically fire-proof, while the *one* one is not; in view of the fact that the new building will be situated on the five-acre

park-like improved tract with liberal open space all around it on the tract; in view of the fact that the home was established and has been maintained at this location since long before the enactment of this zoning ordinance; in view of the fact that the proposed new building with its surrounding grounds will be not only inoffensive in appearance but will be artistic and beautiful in appearance; and in view of the fact that no considerations of safety, health or sanitary conditions are in the least involved in the replacing of the old building by the new building; indeed, all such considerations point to a bettering of all those conditions by the construction of the new building. To my mind, our problem is not necessarily whether or not, speaking generally, the zoning ordinance is valid, but it is whether or not the zoning ordinance is valid as applied to this particular property and its present and prospective use. That the courts are warranted in so inquiring is, I think, abundantly shown by judicial authority.

Parker, J.

I also dissent: Tolman, J.; Holcomb, J.

[fols. 128-132] Petition for rehearing covering 5 pages omitted from this print. It was denied and nothing more by order Aug. 3, 1927.

[fol. 133] In Supreme Court of Washington

[Title omitted]

Order Denying Rehearing—Aug. 3, 1927

The court having considered the appellant's petition for a rehearing herein;

It is ordered that the said petition be and it hereby is denied.

Dated this 3d day of August, 1927.

By the Court:

Mackintosh, Chief Justice.

[fol. 134] IN SUPREME COURT OF WASHINGTON

[Title omitted]

JUDGMENT—Aug. 3, 1927

This cause having been heretofore submitted to the Court, upon the transcript of the record of the Superior Court of King County, and upon the argument of counsel, and the court having fully considered the same, and being fully advised in the premises, it is now, on this 3d day of August, A. D. 1927, on motion of Thos. J. L. Kennedy, Esquire, of counsel for respondent, considered, adjudged and decreed, that the judgment of the said Superior Court be, and the same is, hereby affirmed with costs; the petition for rehearing denied and that the said George W. Roberg, Sup't, etc., have and recover of and from the said Seattle Title Trust Co. as trustee under the last will and testament of Caroline Kline Galland, and from Henry H. Hudson, surety, the costs of this action taxed and allowed at Eighty-four & 40/100 Dollars, and that execution issue therefor. And it is further ordered, that this cause be remitted to the said Superior Court for further proceedings, in accordance herewith.

[fol. 135] [File endorsement omitted]

IN SUPREME COURT OF WASHINGTON

[Title omitted]

PETITION FOR WRIT OF ERROR—Filed Oct. 26, 1927

To the Honorable Kenneth Mackintosh, Chief Justice of the Supreme Court of the State of Washington:

The petition of Seattle Title Trust Company, as Trustee under the last will and testament of Caroline Kline Galland, deceased, the above named relator and petitioner, respectfully shows:

That heretofore on the 3rd day of August, 1927, final judgment was rendered against your petitioner by the Su-

preme Court of the State of Washington in a cause wherein the State of Washington on the relation of your petitioner was the appellant and George W. Roberge, as superintendent of Buildings of the City of Seattle, a municipal corporation, was the respondent, the said cause being on appeal from the Superior Court of King County, State of Washington, wherein it was adjudicated that a certain ordinance of the City of Seattle, entitled "An Ordinance regulating and restricting the location of trades and industries; regulating and limiting the use of buildings and premises and the height and size of buildings; providing for yards, [fol. 136] courts of other open spaces; and esyablishing districts for the said purposes" being Ordinance No. 45382 and approved by the mayor of Seattle on June 28, 1923, was valid and enforcible as against this petitioner who was seeking in said cause to obtain the right to build upon property, which it then and for more than ten years prior thereto had owned and used for the purpose hereinafter set forth, a new building to be used as a residence for old persons, pursuant to the terms of a trust set out in the will of one Caroline Kline Galland, deceased. That the said Superior Court in said cause had found that the said property was well adapted for said purpose, but that the relator was not entitled to erect its said building thereon for the reason that the said property was situate in a first residence district as defined in said ordinance, and that such a residence was forbidden by such ordinance in a first residence district. That upon appeal to this court the said judgment of the Superior Court was affirmed in all things. That this petitioner had duly raised the claim in its pleadings and in its evidence submitted in the Superior Court, and *it* its brief and oral argument before this court, that the said ordinance in so far as it forbade this relator to erect its new building for the uses and purposes aforesaid was void and unenforcible because it was an attempt to deprive this petitioner of valuable property rights without due process of law, all contrary to the provisions of the Constitution of the United States, but this Honorable Court held that the enforcement of the said ordinance against this petitioner as aforesaid did not deprive this petitioner of any rights without due process of law, and affirmed the judgment of the lower court which dismissed the petitioner's action,

thereby depriving this petitioner of a valuable property right without due process of law.

[fol. 137] Your petitioner further shows that the said judgment of the said superior court was and is a final judgment in the highest court of the state of Washington in which a decision in said cause could or can be had.

Your petitioner further shows that a federal question was made in said cause, to-wit: that there was in said cause drawn in question the validity of a statute of the State of Washington, to-wit: the said ordinance of the City of Seattle on the ground of it being repugnant to the Constitution of the United States, and the decision of this court was in favor of the validity of said statute, and that the said decision is and was against a right, privilege and immunity claimed under the Constitution of the United States, and was and is repugnant to and in conflict with the Constitution of the United States.

Wherefore your petitioner prays that a writ of error from the Supreme Court of the United States be allowed in this behalf to the Supreme Court of the State of Washington for the correction of errors complained of; that citation herein be granted and signed; that the bond herewith presented be approved; that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States; that the errors complained of may be reviewed in the Supreme Court of the United States, and that the judgment aforesaid of the Supreme Court of the State of Washington be reversed.

Seattle Title Trust Company, as Trustee under the Last Will and Testament of Caroline Kline Galland, Deceased, by Shank, Belt & Fairbrook, Its Attorneys.

[fol. 138] [File endorsement omitted]

IN SUPREME COURT OF WASHINGTON

[Title omitted]

ASSIGNMENT OF ERRORS—Filed Oct. 26, 1927

Comes now the relator and respectfully submits that in the record, proceedings, decision and final judgment of the

Supreme Court of the State of Washington in the above entitled matter there is manifest error in this, to-wit:

First: The said court erred in holding that the city ordinance of the City of Seattle, No. 45382 and entitled "An Ordinance regulating and restricting the location of trades and industries; regulating and limiting the use of buildings and premises and the height and size of buildings; providing for yards, courts or other open spaces; and establishing districts for the said purposes," approved June 28, 1923, was valid and enforcible as against this relator's claim of right to build and maintain a home for old people in a first residence district.

Second: The said court erred in holding that the said ordinance as applied to the claim of right of this relator was not in conflict with the Fifth Amendment to the Constitution of the United States.

Third: The said court erred in holding that the said ordinance as applied to the claim of right of this relator was not in conflict with Section 1 of the Fourteenth Amendment [fol. 139] to the Constitution of the United States.

Fourth: The said court erred in affirming the judgment of the Superior Court of King County, State of Washington, dismissing the petition of this relator.

Shank, Belt & Fairbrook, Attorneys for Appellant, Plaintiff in Error.

[fols. 140 & 141] Bond on writ of error for $1,000, approved and filed October 26, 1927, omitted in printing.

[fol. 142] In Supreme Court of Washington

[Title omitted]

Order Granting Writ of Error—Filed October 26, 1927

The above entitled matter coming on to be heard upon the petition of the above named relator Seattle Title Trust

Company, as Trustee under the last will and testament of Caroline Kline Galland, deceased, for a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Washington, and upon examination of said petition and the record in said matter and desiring to give the said petitioner an opportunity to present in the Supreme Court of the United States the question presented by the record in this matter, it is

Ordered that a writ of error be and is hereby allowed to this court from the Supreme Court of the United States.

Dated this October 26, 1927.

Kenneth Mackintosh, Chief Justice of the Supreme Court of the State of Washington.

[File endorsement omitted.]

[fol. 143] [File endorsement omitted]

IN SUPREME COURT OF WASHINGTON

WRIT OF ERROR—Filed October 29, 1927

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable Judges of the Supreme Court of the State of Washington, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of an action which is in the said Supreme Court of the State of Washington before you, being the highest court of law or equity of the said state in which a decision could be had in the said suit between the State of Washington on the relation of Seattle Title Trust Company, as trustee under the last will and testament of Caroline Kline Galland, deceased, appellant and plaintiff in error, and George W. Roberge, as superintendent of buildings of the city of Seattle, a municipal corporation, respondent and defendant in error wherein was drawn in question the validity of a certain statute of the State of Washington on the ground of its being repugnant to the Constitution of the United States and the decision

was in favor of its validity, and wherein was drawn in question a title, right, privilege and immunity claimed under the Constitution of the United States, and the decision was against the said title, right, privilege and immunity especially set up and claimed by the said plaintiff in error under such Constitution, a manifest error hath happened to the great damage of the said Seattle Title Trust Company, as trustee under the last will and testament of Caroline Kline Galland, deceased, as by its complaint appears.

We, being willing that error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Su- [fol. 144] preme Court of the United States, together with this writ, so that you may have the same at Washington on the 28th day of December, 1927, in the said Supreme Court, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable William Howard Taft, Chief Justice of the Supreme Court of the United States of America this 28th day of October, A. D. 1927.

Ed. M. Lakin, Clerk of the District Court for the Western District of Washington, Southern Division, by Alice Huggnes, Deputy Clerk, U. S. District Court, Western District of Washington. (Seal of the United States District Court, Western District of Washington.)

Allowed by Kenneth Mackintosh, Chief Justice of the Supreme Court of the State of Washington.

[fol. 145] Citation, in usual form, showing service on Thomas J. L. Kennedy, filed November 2, 1927, omitted in printing.

[fol. 146] IN SUPREME COURT OF WASHINGTON

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD—Filed November 2, 1927

To C. S. Reinhart, Clerk of the Supreme Court of the State of Washington:

You will please include in your return to writ of error in the foregoing case the following of your files, to-wit:

1. Transcript of record from the Superior Court;
2. Abstract of record;
3. Opinion of the Supreme Court;
4. Petition for Rehearing;
5. Order denying rehearing;
6. Final judgment;
7. Petition for writ of error;
8. Assignment of error;
9. Bond on writ of error;
10. Writ of Error;
11. Citation;
12. All exhibits;
13. This praecipe.

Shank, Belt & Fairbrook, Attorneys for Apellant, Seattle Title Trust Company, as Trustee under the Last Will and Testament of Caroline Kline Galland, Deceased.

[File endorsement omitted.]

Copy of within received Nov. 1, 1927. Thomas J. L. Kennedy, Corporation Counsel.

[fol. 147] IN SUPREME COURT OF WASHINGTON

[Title omitted]

ORDER TO TRANSMIT ORIGINAL EXHIBITS

Upon the stipulation of counsel it is ordered that the Clerk of this Court forward the original exhibits with

the transcript in the above-entitled cause to the United States Supreme Court in response to the writ of error herein.

Dated this 10th day of November, 1927.

Kenneth Mackintosh, Chief Justice.

[fol. 148] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 149] In Supreme Court of the United States

Statement of Points on Which Plaintiff in Error Intends to Rely and Designation of Parts of Record to be Printed—Filed December 27, 1927

In accordance with paragraph 9 of rule 11 of the revised rules of the Supreme Court of the United States, this plaintiff in error states that it intends to rely upon the following points, to-wit:

First: The Supreme Court of the State of Washington erred in holding that a city ordinance of the City of Seattle, No. 45382 and entitled "An ordinance regulating and restricting the location of trades and industries; regulating and limiting the use of buildings and premises and the height and size of buildings; providing for yards, courts and other open spaces; and establishing districts for the said purposes," approved June 28, 1923, was valid and enforcible as against this plaintiff's in error claim of right to build and maintain a home for old people in a first residence district.

Second: The said court erred in holding that the said ordinance as applied to the claim of right of this plaintiff in error was not in conflict with the fifth amendment to [fols. 150 & 151] the Constitution of the United States.

Third: The said court erred in holding that the said ordinance as applied to the claim of right of this plaintiff in error was not in conflict with section 1 of the fourteenth amendment to the Constitution of the United States.

Fourth: The said court erred in affirming the judgment of the Superior Court of King County, State of Washington, dismissing the petition of this plaintiff in error.

Corwin S. Shank, Glenn J. Fairbrook, Attorneys for Plaintiff in Error.

Charles Elmore Cropley, Clerk of the Supreme Court of the United States of America:

The above named plaintiff in error considers the following part of the record necessary for the consideration thereof, and therefore requests that you have the same printed, to-wit:

The entire record excepting exhibits.

Corwin S. Shank, Glenn J. Fairbrook, Attorneys for Plaintiff in Error.

Copy of within received Dec. 20, 1927. Thomas J. L. Kennedy, Corporation Counsel.

[fol. 152] [File endorsement omitted.]

Endorsed on cover: File No. 33095. Washington Supreme Court. Term No. 643. The State of Washington on the relation of Seattle Title Trust Company, as trustee under the last will and testament of Caroline Kline Galland, deceased, plaintiff in error, vs. George W. Roberge, as Superintendent of Building of the City of Seattle. Filed December 12th, 1927. File No. 33095.

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SUPREME COURT OF THE UNITED STATES.

No. 29.—October Term, 1928.

State of Washington *ex rel.* Seattle Title Trust Company, as Trustee etc., Plaintiff in Error. *vs.* George W. Roberge, as Superintendent of Building of the City of Seattle.	In Error to the Supreme Court of Washington.

[November 19, 1928.]

Mr. Justice Butler delivered the opinion of the Court.

Since 1914, the above named trustee has owned and maintained a philanthropic home for aged poor. It is located about six miles from the business center of Seattle on a tract 267 feet wide, extending from Seward Park Avenue to Lake Washington, having an average depth of more than 700 feet and an area of about five acres. The home is a structure built for and formerly used as a private residence. It is large enough to accommodate about 14 guests and usually it has had about that number. The trustee proposes to remove the old building and in its place at a cost of about $100,000 to erect an attractive two and one-half story fireproof house large enough to be a home for 30 persons. The structure would be located 280 feet from the avenue on the west and about 400 feet from the lake on the east, cover four per cent. of the tract and be mostly hidden by trees and shrubs. The distance between it and the nearest building on the south would be 110 feet, on the north 160 and on the west 365.

A comprehensive zoning ordinance (No. 45382) passed in 1923 divided the city into six use districts and provided that, with certain exceptions not material here, no building should be erected for any purpose other than that permitted in the district in which the site is located. § 2. The land in question is in the "First Residence District." The ordinance permitted in that district single family dwellings, public schools, certain private schools, churches, parks

and playgrounds, an art gallery, private conservatories for plants and flowers, railroad and shelter stations. § 3 a. And, upon specified conditions, it also permitted garages, stables, buildings for domestic animals, the office of physician, dentist or other professional person when located in his or her dwelling (§ 3 b), fraternity, sorority and boarding houses, a community clubhouse, a memorial building, nurseries, greenhouses, and buildings necessary for the operation of public utilities. § 3 c. It declared that the section should not be construed to prohibit the use of vacant property in such district for gardening or fruit raising, or its temporary use for fairs, circuses, or similar purposes. § 3 e. By an ordinance (No. 49179) passed in 1925, § 3 e was amended by adding: "A philanthropic home for children or for old people shall be permitted in First Residence District when the written consent shall have been obtained of the owners of two-thirds of the property within four hundred (400) feet of the proposed building."*

*The pertinent provisions of the ordinance as amended follow:

The title is:

An ordinance regulating and restricting the location of trades and industries; regulating and limiting the use of buildings and premises and the height and size of buildings; providing for yards, courts or other open spaces; and establishing districts for the said purposes.

Section 2:

(a) For the purpose of regulating, classifying and restricting the location of trades and industries and the location of buildings designed, erected or altered for specified uses, The City of Seattle is hereby divided into six (6) Use Districts, namely: First Residence District, Second Residence District, Business District, Commercial District, Manufacturing District and Industrial District.

(b) The boundaries of the aforesaid districts are laid out and shown upon the map designated "Use Map," filed in the office of the City Comptroller and ex-officio City Clerk. . . . The Use Districts on said map are hereby established.

(c) . . . No building shall be erected, altered or used, nor shall any premises be used, for any purpose other than that permitted in the use district in which such building or premises is located.

(d) Where a use in any district is conditioned upon a public hearing or the consent of surrounding property, such use if existing at the time this ordinance becomes effective, shall be allowed repairs or rebuilding without such hearing or consent.

Section 3. First Residence District.

(a) The following uses only are permitted in a First Residence District:

(1) Single Family Dwellings.

Subsequently the trustee, without having obtained consents of other landowners in accordance with the provision just quoted, applied for a permit to erect the new home. It is the superintendent's official duty to issue permits for buildings about to be erected in accordance with valid enactments and regulations. He denied the application solely because of the trustee's failure to furnish such consents. Then the trustee brought this suit in the superior court of King County to secure its judgment and writ commanding the superintendent to issue the permit; and it maintained throughout that the ordinance, if construed to prevent the erection of the proposed building, is arbitrary and repugnant to the due process and equal protection clauses of the Fourteenth Amendment. That court held that the amended ordinance so construed is valid and dismissed the case. Its judgment was affirmed by the highest court of the State. 144 Wash. 74.

The trustee concedes that our recent decisions require that in its general scope the ordinance be held valid. *Euclid* v. *Ambler Realty*

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(2) Public Schools.

(3) Private Schools in which prescribed courses of study only are given and are graded in a manner similar to public schools or are of a higher degree.

(4) Churches.

(5) Parks and Playgrounds (including usual park buildings).

(6) Art Gallery of Library Building.

(7) Private Conservatories for Plants and Flowers.

(8) Railroad and Shelter Stations.

(b) In a First Residence District, buildings and uses such as are ordinarily appurtenant to dwellings shall be permitted, subject to the limitations herein provided. A garage in a first residence district shall not occupy more than seven per cent (7%) of the area of the lot, and the business of repairing motor vehicles shall not be conducted therein. In the case of a private stable, the written consent must be obtained of the owners of fifty (50) per cent of the property within a radius of two hundred (200) feet of the proposed building. The number of animals, not counting sucklings, in a private stable shall not exceed one for every two thousand (2,000) square feet contained in the area of the lot on which such building is located. Not more than one appurtenant building having a floor area of not to exceed thirty (30) square feet which is used for the housing of domestic animals or fowls shall be permitted on any lot in the First Residence District, except that a building of greater area or a greater number of buildings shall be permitted when the written consent shall have been obtained of the owners of fifty (50) per cent of the dwellings within two hundred (200) feet of the proposed building; provided that such consent shall not be required if the number of said dwellings is less

Co., 272 U. S. 365. *Zahn* v. *Board of Public Works*, 274 U. S. 325. *Gorieb* v. *Fox*, 274 U. S. 603. *Nectow* v. *Cambridge*, 277 U. S. —. Is the delegation of power to owners of adjoining land to make inoperative the permission, given by § 3 (c) as amended, repugnant to the **due process clause**? Zoning measures must find their justification in the police power exerted in the interest of the public. *Euclid* v. *Ambler Realty Co.*, *supra*, 387. "The governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited and, other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare." *Nectow* v. *Cambridge*, *supra*, p—. Legislatures may not, under the guise of the police power, impose restrictions that are unnecessary and unreasonable upon the use of private property or the pursuit of useful activities. *Lawton* v. *Steele*, 152 U. S. 133, 137. *Adams* v. *Tanner*, 244 U. S. 590, 594. *Meyer* v. *Nebraska*, 262 U. S. 390, 399-400. *Burns Baking Company* v. *Bryan*, 264 U. S. 504, 513. *Norfolk Ry.* v. *Public Service Commission*, 265 U. S. 70, 74. *Pierce* v. *Society of Sisters*, 268 U. S. 510, 534-535. *Weaver* v. *Palmer Bros. Co.*, 270 U. S. 402, 412, 415. *Tyson & Brother* v. *Banton*, 273 U. S. 418, 442.

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than four (4). The office of a physician, dentist, or other professional person when located in his or her dwelling, also home occupations engaged in by individuals within their dwellings shall be considered as accessory uses, provided that no window display is made or any sign shown other than one not exceeding two (2) square feet in area and bearing only the name and occupation of the occupant. The renting of rooms for lodging purposes only, for the accommodation of not to exceed six (6) persons, in a single family dwelling shall be considered an accessory use.

(c) A Fraternity house, sorority house or boarding house when occupied by students and supervised by the authorities of a public educational institution, a private school other than one specified in paragraph (a) this section (3), a community club house, memorial building, nursery or greenhouse, or a building which is necessary for the proper operation of a public utility may be permitted by the Board of Public Works after a public hearing. *A philanthropic home for children or for old people shall be permitted in First Residence District when the written consent shall have been obtained of the owners of two thirds of the property within four hundred (400) feet of the proposed building.*

. . . .

(e) Nothing in this section shall be construed to prohibit the use of vacant property for gardening or fruit raising or its temporary use, conformable to Law, for fairs, circuses or similar purposes.

The right of the trustee to devote its land to any legitimate use is property within the protection of the Constitution. The facts disclosed by the record make it clear that the exclusion of the new home from the first district is not indispensable to the general zoning plan. And there is no legislative determination that the proposed building and use would be inconsistent with public health, safety, morals or general welfare. The enactment itself plainly implies the contrary. The grant of permission for such building and use, although purporting to be subject to such consents, shows that the legislative body found that the construction and maintenance of the new home was in harmony with the public interest and with the general scope and plan of the zoning ordinance. The section purports to give the owners of less than one-half the land within 400 feet of the proposed building authority—uncontrolled by any standard or rule prescribed by legislative action—to prevent the trustee from using its land for the proposed home. The superintendent is bound by the decision or inaction of such owners. There is no provision for review under the ordinance; their failure to give consent is final. They are not bound by any official duty, but are free to withhold consent for selfish reasons or arbitrarily and may subject the trustee to their will or caprice. *Yick Wo* v. *Hopkins*, 118 U. S. 356, 366, 368. The delegation of power so attempted is repugnant to the due process clause of the Fourteenth Amendment. *Eubank* v. *Richmond*, 226 U. S. 137, 143. *Browning* v. *Hooper*, 269 U. S. 396.

Cusack Co. v. *City of Chicago*, 242 U. S. 526, involved an ordinance prohibiting the putting up of any billboard in a residential district without the consent of owners of a majority of the frontage on both sides of the street in the block where the board was to be erected. The question was whether the clause requiring such consents was an unconstitutional delegation of power and operated to invalidate the prohibition. The case was held unlike *Eubank* v. *Richmond*, *supra*, and the ordinance was fully sustained. The facts found were sufficient to warrant the conclusion that such billboards would or were liable to endanger the safety and decency of such districts. pp. 529, 530. It is not suggested that the proposed new home for aged poor would be a nuisance. We find nothing in the record reasonably tending to show that its construction or maintenance is liable to work any injury, inconvenience

or annoyance to the community, the district or any person. The facts shown clearly distinguish the proposed building and use from such billboards or other uses which by reason of their nature are liable to be offensive.

As the attempted delegation of power cannot be sustained, and the restriction thereby sought to be put upon the permission is arbitrary and repugnant to the due process clause, it is the duty of the superintendent to issue, and the trustee is entitled to have, the permit applied for.

We need not decide whether, consistently with the Fourteenth Amendment, it is within the power of the State or municipality by a general zoning law to exclude the proposed new home from a district defined as is the first district in the ordinance under consideration.

Judgment reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.